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### An Absolute Power, or A Power Absolutely in Need of Reform? Proposals to Reform the Presidential Pardon Power

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# An Absolute Power, or A Power Absolutely in Need of Reform? Proposals to Reform the Presidential Pardon Power

Democracy and the Constitution Clinic  
Fordham University School of Law

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Milana Bretgoltz, Albert Ford, & Alicia Serrani

January 2021



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**Milana Bretgoltz, Albert Ford, & Alicia Serrani**

**January 2021**

This report was researched and written during the 2019-2020 academic year by students in Fordham Law School's Democracy and the Constitution Clinic, where students developed non-partisan recommendations to strengthen the nation's institutions and its democracy. The clinic was supervised by Professor and Dean Emeritus John D. Feerick and Visiting Clinical Professor John Rogan.

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## Executive Summary

Every president except for two have granted pardons. Accompanying the frequent use of the pardon power is a long history of abuses. President Donald Trump's controversial uses of the pardon power have presented an opportunity to think about how the pardon power is used. But any reform of the power should not be grounded in reacting to one particular president's use of it. Instead, the focus must be ensuring that the integrity of the pardon power, as it is defined in Article II of the Constitution, is upheld and protected.

This report advances a set of reform proposals to prevent abuses of the pardon power. Before reaching the discussion of those reforms, the report traces the history of the pardon power and describes reforms proposed by members of Congress over the last several decades.

England's king held the power to issue pardons starting in the seventh century. Parliament eventually imposed some limitations on the power, including preventing the monarch from granting pardons in cases of impeachment. In the 16<sup>th</sup> century, Parliament gained the ability to pardon by legislation. In the American colonies, most governors held pardon powers. However, when the Revolution ushered in distrust of executive power, many of the newly established states curtailed governors' discretion over pardons. Most of the restrictions involved legislatures in the process.

At the Constitutional Convention in 1787, the delegates debated who should have the pardon power and how to place limitations on it. Some, especially Alexander Hamilton, argued in favor of a nearly unfetter power, similar to the British crown's pardon authority. Hamilton believed the president might need to unilaterally exercise the power to quell "insurrection and rebellion." He also reasoned that the president could grant pardons when the judicial process erred. The framers discussed several possible limitations on the pardon power, such as a ban on self-pardons and a requirement that the Senate approve any pardons. But they settled on only one explicit limitation: a prohibition on pardons "in cases of impeachment."

The Supreme Court has interpreted the pardon power in only a few cases. Its early jurisprudence on the subject interpreted the pardon power broadly. The Court has recognized some minor limitations on the power beyond those in the Constitution's text, including a requirement that recipients accept pardons to make them effective.

Contemporary state constitutions and regulations generally place more limitations on the pardon power than those in the federal Constitution. Although many states vest the pardon power in governors with minimal, if any, restrictions, others have the governor share the power with appointed or elected officials. A few states give the governor no role in the pardon

process. The vast majority of states ban pre-conviction pardons and require notification that a pardon is under consideration.

Over the past half-century, members of Congress have introduced legislation to limit the pardon power. Those proposals have fallen into several categories: bans on self-pardons; bans self-interested pardons; bans pre-conviction and pre-indictment pardons; reforms to the process in the executive branch for issuing pardons; reforms to the timeframe within which pardons may be issued during a presidential term; and reforms to the Department of Justice's Office of the Pardon Attorney.

This report endorses three reforms: a legislative ban on the president's ability to pardon himself or herself; a legislative ban on the president's ability to grant pre-conduct pardons; and two executive orders that would (1) institute post hoc reporting requirements if and when the president pardons a family member or close associate and (2) adopt norms and procedures to govern the process for considering, vetting, and implementing requests for grants of pardons. The post hoc reporting requirements would require that the executive branch transmit to Congress documents and materials relied on and used when considering and granting pardons to a president's family member or close associate. The formalization of procedures would provide greater transparency and consistency to the pardon process.

Bans on self-pardons and pre-conduct pardons may be achieved via constitutional amendment or legislation. While each option has its benefits and drawbacks, we ultimately favor legislation over amendments. It is highly unlikely that proposing and ratifying a constitutional amendment in today's fractured political environment would be possible, and legislative bans on self-pardons and pre-conduct pardons are, we contend, constitutionally permissible. Additionally, legislative bans might win enough bipartisan support for both houses of Congress to pass them and the president to sign them into law.

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## Introduction

The pardon power is one of the least restrained presidential powers. It provides the president the “Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”<sup>1</sup> There are two explicit checks in the text of Article II, Section 2, Clause 1. First, pardons are only permitted for crimes against the United States. Second, the pardon power does not extend to impeachment.

For most of American history, presidents have used their pardon power to correct wrongs, forgive convicts, and temper justice with mercy.<sup>2</sup> Several high-profile pardons have raised significant concerns about how presidents should use the power. These controversial pardons include President Richard Nixon’s pardon of Jimmy Hoffa; President Gerald Ford’s pardon of former President Nixon; President George H.W. Bush’s pardons of various officials involved in the Iran-Contra scandal; and President Bill Clinton’s pardon of Marc Rich. Some of President Trump’s pardons have also sparked backlash, such as his pardons of Sheriff Joe Arpaio,<sup>3</sup> Mathew Golsteyn, and Clint Lorange.<sup>4</sup> His commutation of Roger Stone’s sentence for obstructing Special Counsel Robert Mueller’s investigation into the Trump campaign’s links to Russia also generated an outcry.<sup>5</sup> After the conclusion of the Russia investigation, one of Mueller’s prosecutors speculated that Paul Manafort, a former Trump campaign manager,

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<sup>1</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>2</sup> Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 594 (2012); see also Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1169 (2010) (“For most of our nation’s history, the president’s constitutional pardon power has been used with generosity and regularity to correct systemic injustices and to advance the executive’s policy goals.”).

<sup>3</sup> Former Sheriff Joseph Arpaio was pardoned for a contempt of court conviction for disobeying a court order to stop immigration enforcement, “which was never a job mandated by state statutes for a county sheriff.” See Michael Kiefer & Yvonne Wingett Sanchez, *Arpaio Saga Not Over: Judge to Rule on Conviction*, ARIZ. REPUBLIC (Aug. 30, 2017), <https://www.azcentral.com/story/news/local/phoenix/2017/08/29/judge-wont-vacate-former-sheriff-joe-arpaio-contempt-conviction-without-oral-arguments/614854001/>; Adam Liptak, *Why Trump’s Pardon of Arpaio Follows Law, Yet Challenges It*, N.Y. TIMES (Aug. 26, 2017), <https://www.nytimes.com/2017/08/26/us/politics/trump-pardon-joe-arpaio-constitution.html>. See also *Melendres v. Arpaio*, 695 F.3d 990, 995 (9th Cir. 2012); *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 994 (D. Ariz. 2011).

<sup>4</sup> Army Maj. Mathew Golsteyn was to stand trial for allegedly executing a man suspected of being a Taliban bomb-maker. Army First Lt. Clint Lorange was serving a 19-year sentence for ordering his soldiers to shoot at unarmed civilians in Afghanistan. See Dave Philipps, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. TIMES (Nov. 15, 2019), <https://www.nytimes.com/2019/11/15/us/trump-pardons.html>; Michael A. Robinson, *Trump’s Pardon of Two Former Army Officers Has Sparked New Controversy. Here’s Why.*, WASH. POST (Nov. 17, 2019), <https://www.washingtonpost.com/politics/2019/11/17/trumps-pardon-two-former-army-officers-has-sparked-new-controversy-heres-why/>.

<sup>5</sup> See Peter Baker et al., *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html>.

declined to cooperate with investigators because Trump dangled a pardon for him.<sup>6</sup> Furthermore, Trump’s beliefs about the extent of the pardon power have stoked controversy, specifically his tweeted declaration that he has “the absolute right” to pardon himself for any crime.<sup>7</sup>

In evaluating the wisdom of a broad presidential pardon power, this report suggests reforms to address the following questions about when the pardon power may and should be employed: May Congress place limits on the presidential pardon power? May the president issue a self-pardon? May the president grant a pardon before a crime has been committed or charged? May the president grant a pardon for a self-interested purpose?

Part I reviews the foundations and history of the presidential pardon power, tracing its development from England into the United States Constitution, analyzing Supreme Court precedent on the pardon power, and surveying state pardon powers to see whether they can provide an effective model for a reformed presidential pardon power. Parts II and III highlight various proposals for reforming the presidential pardon power and describe the benefits and drawbacks of the bills that members of Congress have previously introduced. Part IV analyzes the wisdom of a broad presidential pardon power and whether reform is necessary to prevent abuses of it. Part V presents out recommendations to reform the pardon power.

## I. History of the Presidential Pardon Power

The executive pardon power existed long before the Constitutional Convention of 1787. The framers drew on the experiences with the pardon power in England and the colonies when drafting the Constitution’s presidential pardon power clause.<sup>8</sup> This Part examines the British model of the pardon power and its importation to the American colonies through the royal governors. Then, this Part examines the pardon power in early state constitutions and the framers’ conception of the pardon power at the Constitutional Convention. Next, this Part analyzes the Supreme Court’s interpretations of the presidential pardon power. Last, this Part surveys the pardon powers provided by various state constitutions.

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<sup>6</sup> Devlin Barrett, *A Searing Look at the Mueller Investigation*, WASH. POST (Sept. 22, 2020, 1:53 PM), [https://www.washingtonpost.com/outlook/a-searing-look-at-the-mueller-investigation--from-the-inside/2020/09/22/991cccc8-f6c7-11ea-be57-d00bb9bc632d\\_story.html](https://www.washingtonpost.com/outlook/a-searing-look-at-the-mueller-investigation--from-the-inside/2020/09/22/991cccc8-f6c7-11ea-be57-d00bb9bc632d_story.html). See also George Packer, *The Inside Story of the Mueller Probe’s Mistakes*, ATLANTIC (Sept. 21, 2020), <https://www.theatlantic.com/politics/archive/2020/09/andrew-weissmann-mueller-book-where-law-ends/616395/> (“Trump’s pardon power was an obstacle that the prosecutors didn’t anticipate and could never overcome. It kept them from being able to push uncooperative targets as hard as in an ordinary criminal case.”).

<sup>7</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 4, 2018, 8:35 AM), <https://twitter.com/realdonaldtrump/status/1003616210922147841>.

<sup>8</sup> See Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 IND. L. J. 1651, 1654 (2008).



## A. Establishment of the Presidential Pardon Power

Influential English jurist Sir William Blackstone warned that the pardon power is not appropriate for a democracy.<sup>9</sup> Yet the framers rejected Blackstone's position and supported inclusion of a broad executive pardon power in the Constitution that resembled the power as it existed in England.

### 1. The Pardon Power in England

"This [pardoning power] is indeed one of the great advantages of a monarchy in general, above any other form of government; ... In democracies, however, this power of pardon can never subsist; for there nothing higher is acknowledged than the magistrate who administers the laws: and it would be impolitic for the power of judging and pardoning to center in one and the same person."<sup>10</sup>

– *Sir William Blackstone*

The English Crown's pardoning power was fairly expansive. The king possessed the pardon power starting in the seventh century,<sup>11</sup> and, before the 17<sup>th</sup> century, the monarch's power was absolute.<sup>12</sup> Although the Crown eventually came to solely hold the pardon power, there had been competition for the power from "the clergy, the great earls, and the feudal courts," among others.<sup>13</sup> In 1535, Henry VIII seized the pardon power by persuading Parliament to pass an act that committed to the king the "'sole power and auctoritie' to pardon or remit treasons, murders, manslaughters, felonies, or outlawries."<sup>14</sup>

But Parliament limited the monarch's pardoning power after Charles II used the power to stymie Parliament's efforts to impeach Thomas Osborne, Earl of Danby and the Lord High Treasurer of England.<sup>15</sup> In the aftermath of the failed Osborne impeachment, Parliament curtailed the royal pardon power through several measures. The Habeas Corpus Act of 1679 prevented the Crown from granting clemency in cases where "persons were convicted of

<sup>9</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES \*397.

<sup>10</sup> *Id.*

<sup>11</sup> See Fowler, *supra* note 8, at 1654; Michael A. Genovese & Kristine Almquist, *The Pardon Power Under Clinton: Tested But Intact*, in *THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY* 76 (David Gray Alder & Michael A. Genovese eds., 2002).

<sup>12</sup> See William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 487 (1977).

<sup>13</sup> Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 586 (1991).

<sup>14</sup> *Id.*

<sup>15</sup> Ashley M. Steiner, *Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon*, 46 EMORY L.J. 959, 963 (1997).

causing others to be imprisoned outside of England.”<sup>16</sup> In 1689, Parliament prevented ministers of state from receiving immunity from impeachment through royal pardons.<sup>17</sup> The 1701 Act of Settlement permanently removed the Crown’s power to pardon in cases of impeachment.<sup>18</sup> And, in 1721, Parliament gained the right to pardon by legislation.<sup>19</sup>

## 2. Pardon Power in Early State Constitutions

The pardon power was exported to colonial America.<sup>20</sup> Most colonial charters had provisions for the use of a pardon, which was delegated by the king.<sup>21</sup> The charters of Virginia, Massachusetts, the Carolinas, New Jersey, Pennsylvania, and Georgia placed the pardon power in the executive.<sup>22</sup> Connecticut and Rhode Island placed the power in the legislature, but only with the governor and six of the assistant governors being present.<sup>23</sup> However, the Revolutionary War’s “spirit of distrust in strong executive authority”<sup>24</sup> and the experiences with an all-too-powerful monarch led states to shortly thereafter place the pardon power in the hands of “the legislature and governor jointly, or in the legislature alone.”<sup>25</sup>

The new state constitutions of New Hampshire, Massachusetts, New Jersey, Pennsylvania, and Virginia provided that the governor could exercise the pardon power only with consent of the executive council.<sup>26</sup> Although Vermont was not one of the original states, its constitution of 1777 provided for a similar shared exercise of the pardon power.<sup>27</sup> Rhode Island and Connecticut did not make changes and retained their constitutions for several years.<sup>28</sup> Georgia’s constitution merely granted the governor the power to “reprieve a criminal or suspend a fine until the meeting of the assembly, who may determine therein as they shall

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<sup>16</sup> Kobil, *supra* note 13, at 587-88; Duker, *supra* note 12, at 495.

<sup>17</sup> See Duker, *supra* note 12, at 495-96.

<sup>18</sup> Kobil, *supra* note 13, at 588. The Act of Settlement stated “[t]hat no Pardon under the Great Seal of England [shall] be pleadable to an Impeachment by the Commons in Parliament.” Act of Settlement, 1701, 7 Geo. 1, c. 29 (Eng.).

<sup>19</sup> See Kobil, *supra* note 13, at 588.

<sup>20</sup> See Genovese & Almquist, *supra* note 11, at 77-78. See also Duker, *supra* note 12, at 498 (describing broad types of pardon powers given to various colonial governors, which permitted pardons for any offense, even before conviction).

<sup>21</sup> CHRISTEN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES 4 (1922).

<sup>22</sup> *Id.* at 4-8.

<sup>23</sup> *Id.* at 5. See CHARTER OF CONNECTICUT (1662); CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663).

<sup>24</sup> Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, HARV. L. & POL’Y REV. 447, 449 (2009).

<sup>25</sup> Steiner, *supra* note 15, at 965; see also W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 13-14 (1941).

<sup>26</sup> JENSEN, *supra* note 21, at 10 (citing N.H. CONST. of 1784; MASS. CONST. of 1780, pt. II, ch. ii, § 1, art. VIII; N.J. CONST. of 1776, pt. IX; PA. CONST. of 1776, § 20; VA. CONST. of 1776).

<sup>27</sup> *Id.* (citing VT. CONST. of 1777, ch. ii, § 18).

<sup>28</sup> *Id.*

judge fit.”<sup>29</sup> The pardon power was vested in the governor alone in New York, Delaware, Maryland, and the Carolinas.<sup>30</sup> States eventually began increasing the powers of the governor, which resulted in the enlargement of the pardon power.<sup>31</sup> At the time of their admission into the Union, 26 of 35 states vested the pardon power in the governor.<sup>32</sup>

### 3. Pardon Power Debates During the Constitutional Convention

Although neither of the significant plans proposed at the start of the Constitutional Convention—the New Jersey and Virginia Plans—provided for pardon power,<sup>33</sup> delegates generally agreed on the need for some form of the power.<sup>34</sup> The pardon power entered the debate at the urging of Alexander Hamilton, Charles Pinckney, and John Rutledge, and through a proposed provision calling for the power to be nearly as extensive as England’s broad executive pardon power.<sup>35</sup> The relatively minimal debate at the Convention concerned who should exercise the power and what limitations should be placed on it.<sup>36</sup>

Alexander Hamilton’s emphatic arguments for a broad pardon power may have been critical to blocking many limitations. Hamilton was a vocal proponent of giving one person the pardon power to allow for greater accountability, efficiency, and energy in the exercise of the power:

[O]ne man appears to be a more eligible dispenser of the mercy of government, than a body of men . . . [T]he principal argument for reposing the power of pardoning in . . . the Chief Magistrate is this: in seasons of insurrection and rebellion there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; . . . The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity.<sup>37</sup>

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<sup>29</sup> *Id.* (internal quotations omitted) (citing GA. CONST. of 1789, art. II, § 7).

<sup>30</sup> *Id.* (citing S.C. CONST. of 1790, art. II, § 7; N.Y. CONST. of 1777, art. XVIII; DEL. CONST. of 1776, art. VII; MD. CONST. of 1776, art. XXXIII; N.C. CONST. of 1776, art. XIX).

<sup>31</sup> *Id.* The vesting of the pardon power in the governor alone occurred in Georgia in 1789, Pennsylvania in 1790, and Virginia in 1850. *Id.* (citing VA. CONST. of 1850, art. V, § 5; PA. CONST. of 1790, pt. 2, § 9; GA. CONST. of 1789, art. II, § 7).

<sup>32</sup> *Id.*

<sup>33</sup> See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20-23 (Max Farrand ed., 1911) (Virginia Plan); *id.* at 243-45 (New Jersey Plan).

<sup>34</sup> John Dinan, *The Pardon Power and the American State Constitutional Tradition*, 35 POLITY 389, 394 (2003).

<sup>35</sup> Duker, *supra* note 12, at 501 (citing 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, at 380 (Jonathan Elliot ed., 1845)).

<sup>36</sup> See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 411-26 (Max Farrand ed., 1911).

<sup>37</sup> Duker, *supra* note 12, at 505-06 (quoting THE FEDERALIST NO. 74 (Alexander Hamilton)).

In advocating for the president to have a broad power to bestow mercy onto others, Hamilton assumed the president would act in good faith. He envisioned that the president would exercise the pardon power with “[h]umanity and good policy,” and thus “the benign prerogative of pardoning should be as little as possible fettered or embarrassed.”<sup>38</sup> Hamilton believed that the president would exercise the pardon power fairly because holding another’s fate in his hands “would naturally inspire scrupulousness and caution,” and “the dread of being accused of weakness or connivance, would beget equal circumspection.”<sup>39</sup> Hamilton envisioned the president as an “eligible dispenser of the mercy of government” because the judicial process might err, and “without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”<sup>40</sup> Thus, the framers designed the pardon power to temper justice with mercy and to serve the public good.

The framers had few recorded discussions at the Convention about the pardon power, aside from some unsuccessful attempts to restrict its scope.<sup>41</sup> The Committee of Detail’s report, issued as the delegates were nearing the end of their work, kept the president as the only source of pardons and, similar to the English Act of Settlement, provided that presidential pardons “shall not be pleadable in Bar of an Impeachment.”<sup>42</sup> Unsuccessful proposals to limit the pardon power would have required Senate consent for pardons,<sup>43</sup> forbid pre-conviction pardons,<sup>44</sup> forbid pardons for treason “because the President may himself be guilty,”<sup>45</sup> and forbid pardons to protect oneself.<sup>46</sup> The only modification to the pardon provision came from George Mason, who convinced his fellow delegates to prevent the president from issuing pardons “in cases of impeachment.”<sup>47</sup> The pardon provision that emerged from the Convention granted the executive an exclusive and broad pardon power virtually unrestricted by the Constitution.

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Kobil, *supra* note 13, at 590.

<sup>42</sup> *Id.*

<sup>43</sup> Duker, *supra* note 12, at 501 (citing 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, at 480 (Jonathan Elliot ed., 1845)); Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits, and If Not, Should There Be?*, 51 ARIZ. ST. L. J. 71, 77 (2019) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 626 (Max Farrand ed., 1911)).

<sup>44</sup> Duker, *supra* note 12, at 501-02; Eckstein & Colby, *supra* note 43, at 78.

<sup>45</sup> Duker, *supra* note 12, at 502 (citing 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, at 549 (Jonathan Elliot ed., 1845)).

<sup>46</sup> Eckstein & Colby, *supra* note 43, at 78 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 626 (Max Farrand ed., 1911)).

<sup>47</sup> Menitove, *supra* note 24, at 450.

## B. Supreme Court's Broad Interpretation of the Pardon Power

Although the Supreme Court has infrequently ruled on the pardon power's scope, "[c]onsistent with the framers' design, the Supreme Court has interpreted the President's pardon power broadly."<sup>48</sup> The Supreme Court has, on two occasions, invalidated congressional limitations on the pardon power. In *Ex parte Garland*, one of the first cases to address the scope of the presidential pardon power, the Court proclaimed the power to be "unlimited, with the exception [of impeachment]."<sup>49</sup> The *Garland* Court further stated that the pardon power "extends to every offence known to the law and may be exercised at any time after its commission."<sup>50</sup> Similarly, in *United States v. Klein*, the Court stated that the pardon power was exclusively "[en]trusted" to the president "without limit" and that the Constitution does not allow Congress to "change the effect of such a pardon any more than the executive can change a law."<sup>51</sup> In *Schick v. Reed*, the Court upheld President Dwight D. Eisenhower's commutation of a death sentence to life imprisonment without parole, stating that "the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself."<sup>52</sup> Accordingly, the Court reasoned that the power "cannot be modified, abridged, or diminished by the Congress."<sup>53</sup>

While the Supreme Court has never expressly overruled the unlimited nature of the pardon power, several cases provide a series of limits that may arguably have scaled back the unlimited pardon power as envisioned in *Garland* and *Klein*. In the 1877 case *Knote v. United States*, the Court held that the recipient of a pardon is not entitled to proceeds from the sale of property confiscated from him in relation to the judgment for the pardoned crime.<sup>54</sup> Thus, the "president's ability to issue a pardon halts at the gates of the nation's treasury, controlled and funded by the legislative branch, because the money became 'vested' in the United States."<sup>55</sup> This reasoning "indirectly provid[ed] a separation of powers justification for prescribing limitation[s]" on the pardon power.<sup>56</sup>

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<sup>48</sup> See Daniel Hemel & Eric Posner, *If Trump Pardons, It Could Be A Crime*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/opinion/if-trump-pardons-crime-russia.html>.

<sup>49</sup> 71 U.S. 333, 380 (1866).

<sup>50</sup> *Id.* at 380.

<sup>51</sup> 80 U.S. 128, 147-48 (1871).

<sup>52</sup> 419 U.S. 256, 267 (1974).

<sup>53</sup> *Id.* at 266.

<sup>54</sup> 95 U.S. 149, 154 (1877). The Court held that once monies have been paid to U.S. Treasury, "the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress," and a pardon "cannot touch moneys in the treasury of the United States." *Id.*

<sup>55</sup> Zachary J. Broughton, *Constitutional Law—I Beg Your Pardon: Ex Parte Garland Overruled; The Presidential Pardon is No Longer Unlimited*, 41 W. NEW ENG. L. REV. 183, 202 (2019).

<sup>56</sup> *Id.*

The Court next held in *United States v. Wilson*,<sup>57</sup> and subsequently reaffirmed in *Burdick v. United States*,<sup>58</sup> that a pardonee must accept a pardon for it to be valid. In its most recent clemency case, the Court demonstrated a potential shift in its jurisprudence. In addition to recognizing that the pardon power is limited in some capacity, the Court in *Ohio Adult Parole Auth. v. Woodward*, which involved a clemency proceeding at the state level, indicated that judicial review of pardons is appropriate.<sup>59</sup> Chief Justice Rehnquist, writing for four justices, reaffirmed an earlier holding that pardon “decisions . . . are rarely, if ever, appropriate subjects for judicial review.”<sup>60</sup> However, Justice O’Connor, in her concurrence in part, and Justice Stevens, in his concurrence in part and dissent in part, agreed that the courts could review a pardon if the pardon implicates due process concerns or is arbitrarily implemented.<sup>61</sup> Although the dearth of pardon power jurisprudence makes it difficult to determine what the Supreme Court might recognize as a constitutionally offensive pardon, the president’s power to pardon may not be as unlimited as the Court’s early rulings indicated.

### C. The Pardon Power in Current State Constitutions

“[A] single courageous State may, if its citizens choose, serve as a laboratory . . .”

**Justice Louis Brandeis**, dissenting in

*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)

States’ current approaches to the pardon power inform our assessment of various proposals for reform at the federal level. A survey of current state constitutions<sup>62</sup> makes clear that, although plenty embrace robust executive clemency powers, many others reject the Hamiltonian model, insofar as they have provided for participation of officials other than the executive in the exercise of the pardon power and have imposed various restrictions. As of the start of the 21<sup>st</sup> century, “thirty-nine states require advance notice that a pardon is being considered; twenty-

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<sup>57</sup> 32 U.S. 150, 161 (1833).

<sup>58</sup> 236 U.S. 79, 94 (1915).

<sup>59</sup> 523 U.S. 272, 280 (1998).

<sup>60</sup> *Id.* at 276 (citing *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981)).

<sup>61</sup> *Ohio Adult Parole Auth.*, 523 U.S. at 289 (1998) (O’Connor, J., concurring) (“[S]ome *minimal* procedural safeguards apply to clemency proceedings. Judicial intervention might . . . be warranted in . . . a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.” (emphasis in original)); *Id.* at 292 (Stevens, J., concurring in part and dissenting in part) (“There are valid reasons for concluding that even if due process is required in clemency proceedings, only the most basic elements of fair procedure are required. Presumably a State might eliminate this aspect of capital sentencing entirely, and it unquestionably may allow the executive virtually unfettered discretion in determining the merits of appeals for mercy. Nevertheless, there are equally valid reasons for concluding that these proceedings are not entirely exempt from judicial review.”).

<sup>62</sup> The various state approaches to the pardon power are presented in a chart in Appendix A and based on information from Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L. REV. 730 (2012).

five states demand that pardons be accompanied by the reasons for their issuance; and thirty-seven states prohibit pre-conviction pardons.”<sup>63</sup> Thus, states have long recognized the need to prevent abuses of the pardon power.

Every current state constitution has a provision related to the executive pardon power, and most regulate the power to some extent.<sup>64</sup> Six state constitutions give the governor “little or no role” in the pardon process, and the pardon power resides with an independent board that the governor appoints and which is “heavily regulated” and “conduct[s] most of [its] business in public.”<sup>65</sup> In 21 of the 44 states where “the governor exercises most or all of the pardon power,” the governor sometimes “shares power with other elected or appointed officials” or with “an administrative board that is also responsible for prison releases.”<sup>66</sup> In 23 states, the governor is authorized to pardon by law and is not required to consult with other officials before doing so, although some of these states permit some legislative regulation of the “manner of applying” pardons<sup>67</sup> and some require the governor to report to the legislature after a pardon is granted.<sup>68</sup> The wide variety of pardoning policies in the current state constitutions makes it hard to generalize about which model is most effective. However, in analyzing the frequency of pardon grants and the regularity of the pardon process, it appears that the states in which the pardon plays the most functional role are those in which the decision-making authority is shared with other officials.<sup>69</sup>

## II. Tracking Proposals to Reform the Pardon Power

Members of Congress have made many attempts to pass legislation to clarify the scope of the president’s pardon power. Appendix B lists all available bills proposed by members of the House of Representatives and Senate since 1974. To clarify the data collected for this report, the proposed bills are further categorized into categories of reforms. Those categories include bans on self-pardons; self-interested pardons; pre-conviction and pre-indictment pardons; and other proposals including, reforms to the process in the executive branch for issuing pardons; reforms to the timeframe within which pardons may be issued during a presidential term; and reforms to the Department of Justice’s Office of the Pardon Attorney. As this report was being

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<sup>63</sup> Dinan, *supra* note 34, at 411.

<sup>64</sup> Fowler, *supra* note 8, at 1662.

<sup>65</sup> Love, *supra* note 62, at 743-44. *See also infra* Appendix A.

<sup>66</sup> Love, *supra* note 62, at 745.

<sup>67</sup> *Id.* at 747. *See, e.g.*, COLO. CONST. art. IV, § 7 (governor pardons “subject to such regulation as may be prescribed by law relative to the manner of applying”). Some state constitutions give legislatures significant authority to regulate the pardon power. *See, e.g.*, IND. CONST. art. V, § 17 (governor may pardon “subject to such regulations as may be provided by law”).

<sup>68</sup> Love, *supra* note 62, at 747.

<sup>69</sup> *Id.*

finalized in the fall of 2020, the chairs of several House committees introduced legislation with provisions that fall into several of these categories. The Protecting Our Democracy Act would outlaw self-pardons; require the executive branch to provide information to Congress about “any self-serving presidential pardon or commutation in cases involving the President or his/her relatives, contempt of Congress, or obstruction of Congress”; and would clarify that “the President and Vice President are ‘public officials’ and pardons are ‘official acts’ and ‘things of value’ for purposes of the federal bribery statute.”<sup>70</sup>

The record of legislation that we review here does not include proposals for reforming the pardon power to prohibit pardoning specific individuals or resolutions expressing disapproval of the use of the pardon power after historical events such as the Watergate and Iran-Contra scandals. For instance, several bills were proposed after both President Gerald Ford’s pardon of former President Richard Nixon and President Jimmy Carter’s blanket pardon of everyone who dodged the draft during the Vietnam War.<sup>71</sup>

Additionally, in compiling this data, it became evident that some of the proposals fell into more than one category of reform. For instance, several proposals focused on banning a president from issuing a self-pardon, and also included language banning self-interested pardons.<sup>72</sup>

Below are some statistics representing various insights we extracted from the collection and organization of bills concerning the pardon power:

- **Forty-four (44)** bills concerning the pardon power **have been introduced** in Congress since 1974.
- **Eighty-one percent (81%)** of proposed bills have been **introduced by Democratic members** of Congress since 1974.
- **1974** was the year with the **highest number of bills** introduced concerning the pardon power. Ten (10) bills were introduced in that year.

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<sup>70</sup> Press Release, House Committee on Oversight and Reform, House Democrats Introduce Landmark Reforms Package, the Protecting Our Democracy Act (Sept. 23, 2020), <https://oversight.house.gov/news/press-releases/house-democrats-introduce-landmark-reforms-package-the-protecting-our-democracy>.

<sup>71</sup> See, e.g., H.R. Con. Res. 78, 95th Cong. (1977) (opposing the pardon for Vietnam related draft or military absence offences); S. Res. 40, 95th Cong. (1977) (opposing the pardon for Vietnam draft evaders); S. Res. 18, 95th Cong. (1977) (concerning the pardoning of Vietnam draft or military absence offences); H.R. Res. 1382, 93d Cong. (1974) (advocating for continued legal action against President Richard Nixon); H.R. Res. 1370, 93d Cong. (1974) (requesting materials from President Ford concerning his pardon of President Nixon); H.R. Res. 1367, 93d Cong. (1974) (concerning the pardon of President Nixon).

<sup>72</sup> See *infra* Appendix B.



- **Twenty-four** (24) bills concerned **oversight proposals** (~55%); **Fourteen** (14) bills proposed a **ban on pre-conviction or pre-indictment pardons** (~32%); **Nine** (9) bills proposed a **ban on self-interested pardons** (~20%); **Six** (6) bills proposed a **ban on self-pardons** (~14%).
- The bill with the **most co-sponsors** was H.R. Res. 523 (115<sup>th</sup> Congress), introduced by Rep. Karen Bass in 2017. This resolution **expressed disapproval of self-pardons and pardons of family members** and had 51 co-sponsors, all of whom were Democrats.<sup>73</sup>

The following analysis attempts to provide further insight into the broad categories of reform that we have identified through the collection of all available bills introduced in Congress concerning the pardon power since 1974.

### A. Ban on Self-Pardons

A ban on self-pardons seeks to prevent a president from issuing a pardon to himself or herself. This proposal does not seek to merely address the recent claims by President Trump that he has “the absolute right to PARDON [himself].”<sup>74</sup> Efforts to ban self-pardons date back to well before Trump took office in 2017. In 1975, former Representative Elizabeth Holtzman (D-NY-16) introduced three bills that included the stipulation that “[n]o President may pardon himself for any offense against the United States.”<sup>75</sup> Notably, House Democrats have proposed three measures related to self-pardons since 2017.<sup>76</sup> The first bill, introduced in 2017 and then reintroduced in 2019 by Representative Al Green (D-TX-09), sought to deny the president the “power to grant to himself a reprieve or pardon for an offense against the United States.”<sup>77</sup> In 2018, Representative Maxine Waters (D-CA-43) introduced a concurrent resolution that “[e]xpress[ed] the sense of Congress that the President does not have the authority under the Constitution to grant himself a reprieve or pardon for offenses against the United States.”<sup>78</sup> Sixteen other Democrats co-sponsored this resolution.<sup>79</sup>

One advantage of banning self-pardons is that it is well-aligned with the memorandum the Department of Justice’s Office of Legal Counsel issued on August 5, 1974, in advance of President Ford’s pardon of former President Nixon, stating that “no one may be a judge in his

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<sup>73</sup> H.R. Res. 523, 115th Cong. (2017).

<sup>74</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 4, 2018, 8:35 AM), <https://twitter.com/realdonaldtrump/status/1003616210922147841>.

<sup>75</sup> H.R.J. Res. 350, 94th Cong. (1975); H.R.J. Res. 232, 94th Cong. (1975); H.R.J. Res. 156, 94th Cong. (1975).

<sup>76</sup> See *infra* Appendix B.

<sup>77</sup> H.R.J. Res. 13, 116th Cong. (2019); H.R.J. Res. 115, 115th Cong. (2017).

<sup>78</sup> H.R. Con. Res. 132, 115th Cong. (2018).

<sup>79</sup> *Id.*

own case, [and that] the President cannot pardon himself.”<sup>80</sup> However, some reject this proposal as unconstitutional because, they argue, “[the pardon] power is not subject to any textual limitation.”<sup>81</sup> Furthermore, they contend that the Constitution’s impeachment provision provides a pre-existing check on self-pardons.

## **B. Ban on Self-Interested Pardons**

A ban on self-interested pardons seeks to prevent a president from pardoning individuals with whom he or she may have a relationship, like a government employee, business partner, former campaign employee, or family member, where the grant of a presidential pardon may appear biased or self-serving. Since 1975, there have been nine bills introduced in Congress that sought to ban self-interested pardons.<sup>82</sup> Interestingly, the groups of people Congress is concerned about receiving self-interested pardons vary significantly. For instance, in 1988 Representative Barbara Boxer (D-CA-06) proposed a constitutional amendment that would prohibit “the President from granting a pardon to an individual who has been employed by the Federal Government during such President’s term of office.”<sup>83</sup> In 2008, however, Representative Jerrold Nadler (D-NY-08) was more concerned about reigning in self-interested pardons as applied to “senior members of [the president’s] administration.”<sup>84</sup> More recent proposals, such as a proposed constitutional amendment originally introduced by Representative Steve Cohen (D-TN-09) in 2017 and again in 2019, seek to limit the president’s pardon power by removing the president’s ability to pardon close family members, current or former staff members, or paid employees of the president’s election campaign.<sup>85</sup>

One of the advantages of the proposals to ban self-interested pardons is that they seek to further the policy of encouraging fair decision-making by the president. For instance, eliminating a president’s ability to pardon government employees or business partners would likely prevent the president from repaying associates who helped him or her politically or financially through a quid pro quo arrangement. However, a disadvantage of this proposal is that it does not reflect the fact that a president may have non-self-interested reasons for pardoning family members, staff, or business associates. A president could hypothetically develop a policy to grant pardons to non-violent drug offenders who have served a certain percentage of their sentence. It is possible that, as a result of this policy, a president may pardon a family member. In this hypothetical scenario, self-interest does not appear to be the

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<sup>80</sup> Presidential or Legislative Pardon of the President, 1 Op. O.L.C. 370, 370 (1974).

<sup>81</sup> Richard A. Epstein, *Pardon Me, Said the President to Himself*, WALL ST. J. (June 5, 2018), <https://www.wsj.com/articles/pardon-me-said-the-president-to-himself-1528239773>.

<sup>82</sup> See *infra* Appendix B.

<sup>83</sup> H.R.J. Res. 532, 100th Cong. (1988).

<sup>84</sup> H.R. Res. 1531, 110th Cong. (2008).

<sup>85</sup> H.R.J. Res. 8, 116th Cong. (2019); H.R.J. Res. 120, 115th Cong. (2017).

motivation for issuing the pardon. Accordingly, an absolute ban on self-interested pardons for family members might be over-inclusive.

### C. Ban on Pre-Conviction or Pre-Indictment Pardons

A ban on pre-conviction pardons prevents a president from issuing a pardon before the full legal process has concluded and an individual has been convicted of an offense, while a ban on pre-indictment pardons merely prevents a president from issuing a pardon before an individual has been charged with a crime. Since 1974, members of Congress have introduced 11 bills to ban pre-conviction pardons and one bill to ban pre-indictment pardons.<sup>86</sup> Perhaps unsurprisingly, five of these bills were introduced in 1974 by members of the House and Senate<sup>87</sup> following President Ford's pardon of former President Nixon, who was neither indicted nor convicted before his pardon was issued on September 8, 1974.<sup>88</sup> For example, Representative Thomas A. Luken (D-OH-01) proposed a constitutional amendment that would permit the president "to grant pardons only after conviction, unless a majority of both Houses of Congress" approves the pardon before conviction.<sup>89</sup> In the same year, Senator William Proxmire (D-WI) introduced similar language in a joint resolution with Representative John Dent (D-PA-21) stating that "[t]he President shall have the power to [issue a pardon] only after an individual has been convicted of offenses against the United States and sentenced therefor."<sup>90</sup> Interest in reforming the pardon power continued after the 1970s. For example, in 1993, Representative Andrew Jacobs Jr. (D-IN-10) introduced a constitutional amendment attempting to ban the president from issuing pre-conviction pardons.<sup>91</sup> This amendment was co-sponsored by 11 members of the House and is the only resolution relating to the presidential pardon power that was supported by an independent House member.<sup>92</sup>

Only one bill has been introduced in Congress seeking to ban pre-indictment pardons.<sup>93</sup> This bill, introduced in 1974 by Representative Ella Grasso (D-CT-06), provided that "no reprieve or pardon shall be granted until after the filing of an indictment or the formal commencement of other criminal action with respect to that offense."<sup>94</sup> As with the other bills that originated in

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<sup>86</sup> See *infra* Appendix B. Additionally, one resolution was introduced in the House to express the "sense of Congress" that no one should receive a pre-conviction pardon. *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Proclamation No. 4311, 39 Fed. Reg. 32,601 (Sept. 10, 1974).

<sup>89</sup> H.R.J. Res. 1145, 93d Cong. (1974).

<sup>90</sup> S.J. Res. 239, 93d Cong. (1974); H.R.J. Res. 1125, 93d Cong. (1974).

<sup>91</sup> H.R.J. Res. 32, 103d Cong. (1993).

<sup>92</sup> See *infra* Appendix B.

<sup>93</sup> See *id.*

<sup>94</sup> H.R.J. Res. 1138, 93d Cong. (1974).

1974, this bill was likely a response to President Ford’s decision to pardon former President Nixon prior to an indictment or conviction.<sup>95</sup>

One advantage of a ban on pre-conviction or pre-indictment pardons is that it would support following the legal process—including investigation, indictment, discovery, plea bargaining, trial, and sentencing—in all cases. Furthermore, it would renew the sense that the pardon power is a check on failures of the judiciary, rather than a political tool. One disadvantage of a ban on pre-conviction or pre-indictment pardons is that it might lead to inefficiencies. The expense and time required to convict or indict someone is considerable—and seemingly wasted if the president has already decided to issue a pardon regardless of the outcome. Another disadvantage of this proposal is that it would likely require a constitutional amendment, which would take considerable, and potentially unattainable, political will to ratify.

#### **D. Oversight Proposal**

Oversight proposals generally seek to impose some level of mandatory congressional involvement or signoff when a president wants to issue a pardon. Since 1974, 24 oversight bills have been introduced.<sup>96</sup> Most recently, in 2019, Senator Catherine Cortez Masto (D-NV) and Representative Adam Schiff (D-CA-28) introduced the Abuse of the Pardon Prevention Act, which would impose a document review requirement within 30 days after certain pardons have been granted.<sup>97</sup> The bill “requires the Department of Justice to submit to Congress all investigative materials related to an offense for which the President pardons an individual if the offense arises from an investigation in which the President, or a relative of the President, is a target, subject, or witness.”<sup>98</sup> The Abuse of the Pardon Prevention Act was co-sponsored by four members of the Senate and 27 members of the House, all of whom were Democrats.<sup>99</sup>

One of the advantages of the oversight proposal is that it does not explicitly limit or constrain who the president can pardon, potentially making it more likely to pass through Congress than more stringent limitations on the pardon power. Furthermore, this proposal would not be difficult to implement because the Department of Justice, through the Office of the Pardon Attorney, is already involved in the pardoning process. Moreover, by introducing rigorous congressional oversight, this proposal “would create a powerful disincentive for any President

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<sup>95</sup> See Laura M. Holson, *‘No One Could Believe It’: When Ford Pardoned Nixon Four Decades Ago*, N.Y. TIMES (Sept. 8, 2018), <https://www.nytimes.com/2018/09/08/us/politics/nixon-ford-pardon-watergate.html>.

<sup>96</sup> See *infra* Appendix B.

<sup>97</sup> S. 2090, 116th Cong. (2019); H.R. 1627, 116th Cong. (2019).

<sup>98</sup> S. 2090, 116th Cong. (2019); H.R. 1627, 116th Cong. (2019).

<sup>99</sup> See *infra* Appendix B.

who seeks to use the pardon power as an instrument of obstruction in an investigation.”<sup>100</sup> One of the disadvantages of this proposal is that it will likely be challenged under *United States v. Klein*, which states that the pardon power is entrusted to “the executive alone . . . and it is granted without limit.”<sup>101</sup> Moreover, none of the 24 oversight proposals that have been introduced in Congress have won approval—a history that does not bode well for similar future legislation.

### E. Timing Proposal

Timing proposals seek to limit the timeframes during which a president may issue pardons. For example, in 2001, Representative Barney Frank (D-MA-04) introduced a bill that sought to limit a president from exercising the pardon power “between October 1 of a year in which a Presidential election occurs and January 21 of the year following.”<sup>102</sup> One factor that may have influenced Representative Frank to introduce that specific reform was President Clinton’s issuance of 140 pardons on his final day in office, January 20, 2001.<sup>103</sup> Among those who received a pardon was Marc Rich, whose former wife donated to the Democratic Party between 1993 and 2001, including to Hillary Clinton’s Senate campaign and to the Clinton Library.<sup>104</sup> In a *New York Times* op-ed, President Clinton wrote that the pardon was justified for foreign policy reasons and because Marc Rich had already paid his fines and donated generously to “Israeli charitable causes.”<sup>105</sup> Clinton strongly denied that there was any “quid pro quo.”<sup>106</sup>

One of the advantages of a timing proposal like Representative Frank’s is that it would reduce the likelihood of a president issuing self-serving pardons at the end of his or her term. One of the potential disadvantages of a limitation on the time at which presidents can issue pardons is that it could inadvertently block the issuance of appropriate pardons, curtailing the positive impact of the pardon power, which is to show the “mercy of government.”<sup>107</sup> Furthermore, this

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<sup>100</sup> Press Release, Congressman Adam Schiff, Schiff Introduces Legislation to Prevent Abuse of Presidential Pardons (Mar. 7, 2019), <https://schiff.house.gov/news/press-releases/schiff-introduces-legislation-to-prevent-abuse-of-presidential-pardons>.

<sup>101</sup> 80 U.S. 128, 147 (1871).

<sup>102</sup> H.R.J. Res. 22, 107th Cong. (2001).

<sup>103</sup> See William Jefferson Clinton, *My Reasons for the Pardons*, N.Y. TIMES (Feb. 18, 2001), <https://www.nytimes.com/2001/02/18/opinion/my-reasons-for-the-pardons.html>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (“I decided to grant the pardons . . . for the following legal and foreign policy reasons: . . . many present and former high-ranking Israeli officials of both major political parties and leaders of Jewish communities in America and Europe urged the pardon of Mr. Rich.”).

<sup>106</sup> *Id.*

<sup>107</sup> THE FEDERALIST NO. 74 (Alexander Hamilton).

proposal does not prevent a president from issuing self-serving pardons at other advantageous times.

## F. Pardon Attorney Reform Proposals

Pardon attorney reform proposals seeks to reform the responsibilities of the Department of Justice's pardon attorney. For example, in 2000, Senator Orrin Hatch (R-UT) and Representative Vito Fossella (R-NY-13) introduced the Pardon Attorney Reform and Integrity Act, which sought to codify the role the pardon attorney should take in assisting the president with issuing pardons, including by requiring the pardon attorney provide a report to the president on the Office of the Pardon Attorney's investigation and analysis of a potential pardon.<sup>108</sup> This bill was proposed and co-sponsored by Republican members of the House and Senate near the end of President Clinton's time in office, which is notable because Democrats have introduced 81 percent of the proposed pardon reform bills.<sup>109</sup>

One of the advantages of the pardon attorney reform proposal is that it does not explicitly limit or constrain whom the president pardons. However, one of the disadvantages is that the president's use of the Office of the Pardon Attorney is completely discretionary—meaning any reforms to the process will only be implemented if the president chooses to involve the pardon attorney.<sup>110</sup>

Outside of the proposal to reform the Office of the Pardon Attorney, other proposals have called for restructuring the pardon process. For example, one proposal called for removing the Office of the Pardon Attorney from the purview of the Department of Justice and instead creating an independent clemency advisory board.<sup>111</sup> Such proposals seek to remove bias from the pardon process.<sup>112</sup>

## III. Whether Reform Is Necessary

In light of the many attempts to alter the pardon power through legislation and constitutional amendments, this Part examines whether reform of the pardon power is necessary. Because the presidential pardon power is an enumerated constitutional power, the argument that it should be reformed or curtailed by legislation is countered by strong and well-developed

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<sup>108</sup> S. 2042, 106th Cong. (2000); H.R. 3626, 106th Cong. (2000).

<sup>109</sup> See *infra* Appendix B.

<sup>110</sup> *Frequently Asked Questions*, U.S. DEP'T OF JUSTICE, [https://www.justice.gov/pardon/frequently-asked-questions\\_](https://www.justice.gov/pardon/frequently-asked-questions_)

<sup>111</sup> Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 19-25 (2015).

<sup>112</sup> *Id.*

Supreme Court precedent,<sup>113</sup> Office of Legal Counsel memoranda,<sup>114</sup> and scholarly analysis.<sup>115</sup> Reform also faces practical political challenges. Congress has never approved any changes to the pardon power despite many attempts, even during critical moments of political instability, such as after the pardon of President Richard Nixon.<sup>116</sup> The combination of these legal and practical challenges has led some to believe that the pardon power should not be reformed.

However, the lack of immediate checks on a president's pardon power opens the door to abuses. Impeachment is an imperfect safeguard because it involves an extensive and time-consuming process and requires broad support in Congress. Furthermore, the ultimate outcome of a successful impeachment process—removal from office—is a severe penalty that may only be appropriate for the most egregious abuses of the pardon power. Many White Houses have attempted to bring standardization and oversight to the clemency process by involving the Department of Justice's Office of the Pardon Attorney. But, as the Department of Justice has recognized, the president's use of the Office of the Pardon Attorney is completely discretionary.<sup>117</sup> Thus, the Office of the Pardon Attorney is not truly able to hold the president accountable for any abuse of the pardon power.

The president is currently able to issue pardons that violate fundamental principles of transparency and fairness and run contrary to the president's duty to "faithfully execute the Office of President."<sup>118</sup> Legislation or an amendment that would place a limit on these types of pardons and strengthen the public's confidence that pardons are principally aimed at tempering justice with mercy, rather than merely as a tool for a president to provide personal favors to friends.

## IV. Our Recommendations

Through understanding the history and development of the pardon power in England, the American colonies, and in the United States Constitution, along with an assessment of past and current proposals to reform the presidential pardon power, we recommend three reforms: (1) a statute prohibiting the president from pardoning himself or herself; (2) a statute prohibiting the

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<sup>113</sup> See *supra* Part I.B.

<sup>114</sup> See Presidential or Legislative Pardon of the President, *supra* note 80, at 371 ("[I]t has been the position of the Department of Justice that Congress cannot enact pardoning legislation . . .").

<sup>115</sup> See, e.g., Epstein, *supra* note 81 ("[T]he pardon power was created as a unilateral check on the power of the legal system to inflict punishment.").

<sup>116</sup> See *infra* Appendix B.

<sup>117</sup> U.S. DEP'T OF JUSTICE, *supra* note 110.

<sup>118</sup> U.S. CONST. art. II, § 3; see also *Examining the Constitutional Role of the Pardon Power: Hearing Before the Subcomm. on Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Andrew Kent, Professor, Fordham Univ. Sch. of Law) [hereinafter Kent].

president from granting pre-conduct pardons; and (3) executive orders more clearly defining the process for issuing pardons and bringing more transparency to the process. Each recommendation is assessed in this Part based on policy, practical, and legal considerations.

## **A. Legislation Banning the President from Pardoning Himself or Herself**

Congress should pass legislation prohibiting the president from issuing a pardon to himself or herself. Self-pardons violate bedrock principles of our legal system, especially the maxims that everyone is equal before the law and that no one should be a judge in their own case. Although the Supreme Court has looked askance at legislatively restricting the pardon power,<sup>119</sup> the Constitution’s pardon clause uses language that suggests the president cannot issue self-pardons. Specifically, the clause’s authorization for the president to “grant” pardons implies a grantor-grantee relationship in which there must be at least two parties: one to grant a pardon and another to receive it.<sup>120</sup>

### **1. Policy Considerations: Is legislation prohibiting self-pardons good policy?**

Presidential self-pardons seem to violate the basic principles upon which the U.S. government and legal system rest. A 1974 memorandum from the Department of Justice’s Office of Legal Counsel concluded that self-pardons were contrary to “the fundamental rule that no one may be a judge in his own case.”<sup>121</sup> And while the president’s power to grant pardons is extra-judicial in the sense that it is done outside the confines of the standard criminal legal process, no other American citizen has the unilateral power to absolve themselves of criminal liability.

In addition to violating the maxim that no person may be the judge in his or her own case, permitting the president to pardon himself or herself seems to run contrary to the principle that no one is above the law. A scenario in which a president commits a crime and then pardons himself or herself for it may seem unlikely, but the mere possibility is reason enough to erect a guardrail in the form of a ban on presidential self-pardons. While many of the arguments put forward here involve legal considerations, their foundations are more normative than they are legal. To legislatively prohibit a president from pardoning himself or herself affirms and codifies what is embedded in the American consciousness: that all are equal before the law and no one—not even the president—is above the law.

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<sup>119</sup> See *Schick v. Reed*, 419 U.S. 256, 266, 267 (1974) (holding that Congress cannot “modif[y], abridge[], or diminish[]” the pardon power and that any limits on the pardon power “must be found in the Constitution itself”); *Ex parte Garland*, 71 U.S. 333, 351 (1866) (referring to the president’s pardon power as “unlimited,” except for the constitutional prohibition “in cases of impeachment”).

<sup>120</sup> Article II, Section 2, Clause 1 states, in part, that “[t]he President shall . . . have power to *grant* Reprieves and Pardons. . . .” U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

<sup>121</sup> Presidential or Legislative Pardon of the President, *supra* note 80, at 370.



Is a legislative ban on self-pardons the best way to prohibit the president from pardoning himself or herself? The better question may be whether a legislative ban on self-pardons is likelier to become reality than a constitutional amendment or a self-imposed executive order. Given the divided political environment gripping Congress and most of the states,<sup>122</sup> it seems highly unlikely that a constitutional amendment could win ratification. Political polarization aside, the Pew Research Center found that since the Constitutional Convention of 1787, 12,000 amendments have been proposed in Congress and only 33 have been sent to the states.<sup>123</sup> It seems just as unlikely that a president would impose a restriction on himself or herself by issuing an executive order banning self-pardons.

## **2. Practical Considerations: Can a legislative ban on self-pardons pass Congress with a veto-proof majority?**

On the surface, there appears to be nothing inherently partisan about legislation prohibiting presidential self-pardons. The pardon power is, or at least can be, apolitical. Thus, members of Congress might put politics aside to uphold the aforementioned values and principles that undergird our system of government and laws. Further, a president may hesitate to veto a self-pardon ban out of concern that the public might infer that he was engaged in some form of nefarious behavior that may require a self-pardon to avoid criminal liability. The avoidance of this political embarrassment or shame may compel his signature on legislation that prohibits self-pardons.

However, presidents and, in many cases, their political parties are likely to resist attempts to reduce the power of the presidency. A self-pardon ban would scale back the powers of the presidency and, therefore, encounter opposition from the president and members of Congress who belong to the president's party.

While political considerations are not reason to permanently discard the practical possibility of legislation banning presidential self-pardons, the legal considerations present their own difficulties.

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<sup>122</sup> See, e.g., Philip A. Wallach & James Wallner, *Congress Is Broken. But Don't Blame Polarization.*, REALCLEAR POLICY (June 8, 2018), [realclearpolicy.com/articles/2018/06/08/congress\\_is\\_broken\\_but\\_dont\\_blame\\_polarization\\_110662.html](https://realclearpolicy.com/articles/2018/06/08/congress_is_broken_but_dont_blame_polarization_110662.html).

<sup>123</sup> Drew DeSilver, *Proposed Amendments to the U.S. Constitution Seldom Go Anywhere*, PEW RES. CTR. (Apr. 12, 2018), <https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/>.

### 3. Legal Considerations: Can legislation that bans self-pardons withstand a challenge to its constitutionality?

The Constitution and Supreme Court precedent supports a ban on self-pardons. Inherent in Article II's use of the word "grant" is the grantor-grantee relationship between one person who is the grantor and another who is the grantee, or between one grantor and one group of grantees. One person cannot serve as both grantor and grantee.<sup>124</sup> As previously noted, the Supreme Court in *Schick v. Reed* mandated that any limit on the pardon power be found in the Constitution's text.<sup>125</sup> Finding that limit in a word in the Article II pardon power clause—"grant"—is consistent with the holding in *Schick*. Further, in *Biddle v. Perovich*, the Court stated that the "public welfare" is a factor in considering uses of the pardon power.<sup>126</sup> It is difficult to imagine how a president pardoning himself or herself to avoid prosecution or incarceration could serve the "public welfare."

A court could plausibly rely on the preceding arguments to validate a ban on self-pardons. However, ample precedent could also support a ruling against a prohibition. Indeed, a bevy of Supreme Court decisions indicate that the pardon power is absolute. Perhaps the most expansive of the Court's decisions regarding the pardon power is *Ex parte Garland*. There, the Court, as previously noted, held that the pardon power is "unlimited" except for the limitations found in the text of the Constitution<sup>127</sup> and "is not subject to legislative control."<sup>128</sup> In *Ex parte Grossman*, the Court reached a similar conclusion.<sup>129</sup> Chief Justice (and former President) William Howard Taft wrote that "[t]he executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this *without modification or regulation by Congress*."<sup>130</sup>

Although Supreme Court precedent does not provide a substantial opening for limitations on the pardon power, the Court has never explicitly addressed the issue of a president issuing a self-pardon because no president has done so. Furthermore, in analyzing the legality of a self-pardon ban, great weight should be given to the fact that a presidential self-pardon violates some of the most foundational democratic values of this country: that no one can be the judge in his or her own case and that no one is above the law.

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<sup>124</sup> See, e.g., Kent, *supra* note 118; CHARLES L. BLACK, JR. & PHILIP BOBBITT, *IMPEACHMENT: A HANDBOOK*, NEW EDITION 135 (2d ed. 2018).

<sup>125</sup> 419 U.S. 256, 267 (1974).

<sup>126</sup> 274 U.S. 480, 486 (1927).

<sup>127</sup> *Schick*, 419 U.S. at 267.

<sup>128</sup> *Ex parte Garland*, 71 U.S. 333, 380 (1866).

<sup>129</sup> 267 U.S. 87, 120 (1925).

<sup>130</sup> *Id.* (emphasis added).

## B. Legislation Prohibiting the President from Granting Pre-Conduct Pardons

Congress should pass legislation barring the president from issuing pardons for actions that have not yet occurred. In *United States v. Wilson*, Chief Justice John Marshall proclaimed that “[a] pardon is an act of grace.”<sup>131</sup> Marshall may have reasoned that in considering when and to whom to grant a pardon, the president makes a determination that the grantee is facing a punishment that is too harsh or is worthy of another opportunity not available to him or her without a pardon. Incumbent upon Marshall’s view of a pardon as “an act of grace” and the president’s determination that the potential grantee is a worthy recipient is what happened first: an act was committed.

It is important to note that there is a key difference between pre-conduct pardons and pre-emptive pardons. Banning the president from granting pre-conduct pardons means pardons cannot be granted or offered prior to the “offense”; banning pre-emptive pardons would prohibit the president from granting pardons prior to indictment or before charges are filed against the offending individual. We propose the former, not the latter.

### 1. Policy Considerations: Is legislation prohibiting a president from granting pre-conduct pardons good policy?

Consider the following hypothetical: President A, running for re-election, has learned that a large number of wealthy 17-year-olds, despite their age barring them from making campaign donations, are eager to see President A win a second term. Pressed for cash, President A would greatly benefit from a sudden influx of campaign donations, and privately instructs her campaign manager, Person B, to tell the 17-year-olds that it is quite alright for them to donate, and that they should, if prompted, lie about their ages and say they are all 18 years old.<sup>132</sup> Person B, aware that he would likely violate campaign finance laws if he did this, expresses his discomfort and hesitation to President A. President A dismisses Person B’s concerns, telling him she will grant him a pardon prior to him giving the instructions to the 17-year-olds.

Legislation banning the president from offering or granting a pre-conduct pardon would hopefully prevent this hypothetical—and other self-dealing pardons—from happening.<sup>133</sup>

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<sup>131</sup> 32 U.S. 150, 160 (1833).

<sup>132</sup> See 52 U.S.C. § 30126 (2015) (stating that no one who is 17 years old or younger can make a political contribution).

<sup>133</sup> President Trump has reportedly considered pardoning officials who would have to break the law to speed up construction of the wall along the U.S.’s southwestern border. Nick Miroff & Josh Dawsey, *‘Take the Land’: President Trump Wants A Border Wall. He Wants It Black. And He Wants It By Election Day.*, WASH. POST (Aug. 27, 2019), [https://www.washingtonpost.com/immigration/take-the-land-president-trump-wants-a-border-wall-he-wants-it-black-and-he-wants-it-by-election-day/2019/08/27/37b80018-c821-11e9-a4f3-c081a126de70\\_story.html](https://www.washingtonpost.com/immigration/take-the-land-president-trump-wants-a-border-wall-he-wants-it-black-and-he-wants-it-by-election-day/2019/08/27/37b80018-c821-11e9-a4f3-c081a126de70_story.html).

Additionally, some uses of pre-conduct pardons—such as pardoning all violations of certain laws in advance—would be tantamount to a suspension of those laws, which would encroach on Congress’s legislative powers. This ban would decrease the possibility of bribery-related behavior, maintain Congress’s proper role in the lawmaking process, and reinforce the tenet that Chief Justice Marshall put forward: pardons are meant to lessen or remove the punishments imposed by the state on an offending individual who, in the president’s judgment, deserves such grace.

## **2. Practical Consideration: Can a legislative prohibition on pre-conduct pardons pass Congress with a veto-proof majority?**

The practical considerations here are not dissimilar from the ones discussed for the legislative ban on self-pardons. Congress passing legislation that prohibits the president from granting a pre-conduct pardon seems, on the surface, to be relatively uncontroversial. However, one may conceive of situations in which the president may wish to issue pre-conduct pardons to serve national security or foreign policy priorities—areas over which both the Supreme Court and the Congress have given the executive branch broad discretion.<sup>134</sup> Perhaps, when considering these kinds of situations, Congress would be wary of legislation banning presidential pre-conduct pardons if lawmakers think such legislation may unduly hinder the president’s decision-making and order-giving capacities in times of national crises. Indeed, Alexander Hamilton believed the president could use the pardon power to quell insurrections.<sup>135</sup>

But lawmakers and the president might be willing to look past these considerations in the face of the strong constitutional arguments against pre-conduct pardons. The Constitution’s authorization to the president to pardon “offenses against the United States” implies that the “offenses” have already taken place.<sup>136</sup> Congress and the president may very well conclude that the national interest is never truly served when the president oversteps the office’s powers.

## **3. Legal Considerations: Is legislation that prohibits a president from granting pre-conduct pardons constitutional?**

The Supreme Court has explicitly recognized the illegitimacy of pre-conduct pardons. In *Ex parte Garland*, the Court held, “[The pardon power] extends to every offence known to the law, and may be exercised at *any time after its commission*. . . .”<sup>137</sup> In light of the Court’s explanation and the Constitution’s explicit and precise reference to “[o]ffenses,” it might be that a ban on

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<sup>134</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>135</sup> See generally THE FEDERALIST NO. 74 (Alexander Hamilton).

<sup>136</sup> See U.S. CONST. art. II, § 2, cl. 1.

<sup>137</sup> 71 U.S. 333, 380 (1866) (emphasis added).

pre-conduct pardons is merely a legislative clarification of a pre-existing provision in the Constitution. By granting a pardon to an individual *before* he commits his offense, the president would violate a clear restriction imposed on him or her by the language of Article II.<sup>138</sup> Pardons may not be granted to individuals who have not committed an offense; a presidential pardon can only be properly effectuated when it is granted in response to an offense.<sup>139</sup>

### **C. Executive Order(s) Requiring Reporting to Congress on Pardons to Certain Individuals and Creating a Clear Process for Considering and Granting Pardons**

The president should use executive orders to establish more detailed policies in the executive branch for use of the pardon power. First, the president should implement a post hoc requirement for providing information and documents to Congress about pardons granted by the president to members of the president's family; an officer of the United States whom the president appointed; the vice president; members of the Executive Office of the President who report directly to the president; and the White House chief-of-staff, or a similar post if the chief-of-staff position is not filled. Second, the president should set a procedure for considering and granting pardons, including defining the roles and responsibilities of the following individuals and offices: the president, the White House Counsel's Office, the deputy attorney general, and the Office of the Pardon Attorney.

Steven Levitsky and Daniel Ziblatt, both professors of government at Harvard University, write about the significance of what they refer to as "executive forbearance."<sup>140</sup> Specifically, they note how President George Washington "worked hard to establish norms and practices that would complement—and strengthen—constitutional rules."<sup>141</sup> From Washington's scrupulous choices and actions while he served as president for eight years came "[n]orms of presidential restraint."<sup>142</sup> Into the 20<sup>th</sup> century, "presidents abided by established norms of self-limitation," and notably "never used pardons for self-protection or narrow political gain, and most sought the advice of the Justice Department before issuing them."<sup>143</sup> As it relates to pardons, the "executive forbearance" so dutifully and purposefully established by Washington began to show cracks in the late 20<sup>th</sup> and early 21<sup>st</sup> centuries.

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<sup>138</sup> Telephone Interview with Mark Osler, Professor and Robert and Marion Short Distinguished Chair in Law, Univ. of St. Thomas Sch. of Law (Nov. 12, 2019).

<sup>139</sup> U.S. CONST. art. II, § 2, cl. 1; *Ex parte Grossman*, 267 U.S. 87, 120 (1925); *Ex parte Garland*, 71 U.S. 333, 380 (1866).

<sup>140</sup> STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 128-33 (2018).

<sup>141</sup> *Id.* at 128-29.

<sup>142</sup> *Id.* at 129.

<sup>143</sup> *Id.* at 130.

President George H. W. Bush’s Iran-Contra pardons in December 1992 and President Clinton’s pardons of his brother and Marc Rich in January 2001 raised serious questions about the motivations for the pardons.<sup>144</sup> They appeared to be markedly different from past controversial pardons, such as President Ford’s pardon of former President Nixon and President Carter’s pardons of the Vietnam War draft dodgers,<sup>145</sup> in that Bush’s and Clinton’s had more markings of self-interest than national interest.<sup>146</sup>

For so much of U.S. history, presidents chose to execute the duties of their office with restraint and measured fortitude.<sup>147</sup> Now, the presidency is described as a “constitutional battering ram.”<sup>148</sup> Presidents should emulate Washington’s “executive forbearance” and return to self-imposing regulations on their use of the pardon power.<sup>149</sup>

### **1. Policy Considerations: Are executive orders the best way to bring more transparency and process to the pardon-granting procedure?**

All it takes to establish a norm is for one person to do something and the next person to pick up where the first person left off. Issuing and subsequently abiding by executive orders that seek to build transparency and consistency into a process—considering and granting pardons—that at times is the antithesis of transparency and consistency, is a most formidable undertaking.

Given the aforementioned examples, a president’s pardon of a close associate or family member is inherently controversial and raises serious, justified questions about a president’s rationale for doing so. Do the American people have the right to know the reasons for each and every decision a president makes? From a purely logistical perspective, that would be impossible to accomplish. But for noteworthy, uncommon, or perhaps suspect decisions that a president makes, it is not unreasonable for the president to be prepared to offer some background on how or why he or she arrived at a particular decision.

A reporting requirement could even impact a president’s decision to issue certain pardons. Knowing that pardons of certain individuals would trigger increased disclosure to Congress and, in effect, the public, could lead a president to think twice about the prudence of granting such a pardon. As a result, a president may be more motivated to grant pardons he knows he can explain—meaning, ones that are not granted with the president’s self-interest as the primary

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<sup>144</sup> See *supra* Introduction.

<sup>145</sup> Andrew Glass, *President Carter Pardons Draft Dodgers, Jan. 21, 1977*, POLITICO (Jan. 21, 2018), <https://www.politico.com/story/2018/01/21/president-carter-pardons-draft-dodgers-jan-21-1977-346493>.

<sup>146</sup> See *supra* Introduction.

<sup>147</sup> See LEVITSKY & ZIBLATT, *supra* note 140, at 127-28.

<sup>148</sup> *Id.* at 128.

<sup>149</sup> *Id.*

motivator—to people he knows are worthy grantees. It is also worthwhile for a president to expend energy to further solidify and define the process for considering and granting pardons and to subsequently mandate that the president, the White House Counsel’s Office, the deputy attorney general, and the Office of the Pardon Attorney uphold that process and ensure across-the-board accountability.

## **2. Practical Considerations: Why are these executive orders more attractive options than legislation?**

While it might be constitutional for Congress to pass reporting requirements for when a president pardons a family member or close associate, it is hard to imagine that any president—let alone one whose political party retains majorities in both the House and the Senate—would not veto any such legislation. The president is likely armed with a good reason for a veto: granting a pardon—even one to a family member or close associate that appears to be entirely reasonable and justified—often involves an appraisal of a grantee’s sensitive, personal information. Agreeing to transmit such information in a way that may put at risk the grantee’s privacy or security is likely not something a president is going to be forced into doing. Additionally, the president would almost certainly oppose legislation establishing a process for issuing pardons because he or she would like to retain the flexibility provided by executive order to easily amend or improve the processes.

## **3. Legal Considerations: Are there any concerning issues with the legality or constitutionality of these executive orders?**

As the sole grantor of the pardon power outlined in Article II of the Constitution and the head of the executive branch, the president has broad discretion to reform the pardon power in a way that promotes transparency and consistency. A more transparent and consistent process—especially one that the president has created himself or herself or agreed to leave in place one implemented by a predecessor—will not likely raise, at least facially, serious legal or constitutional questions.

## **V. Conclusion**

The pardon power can serve valuable purposes. Wrongful prosecutions and mishaps in the judicial process need a remedy. Even where there are no errors, some who are convicted of crimes deserve leniency that ordinary processes cannot provide. But the pardon power as it currently exists is too unfettered. The reforms we recommend are needed to prevent president from hijacking the pardon power to serve his or her own interests. If implemented, these reforms will provide assurances that the authority to grant pardons will be exercised to serve the noble ends that the Constitution’s framers envisioned.

## Appendix A: State Pardon Provisions

(Based on: Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*,  
9 U. St. Thomas L. Rev. 730 (2012))

| State | Pardon Process  | Frequency of Grants  |
|-------|---|--|
| AL    | Independent board appointed by governor exercises pardon power, except governor has authority in capital cases. Ala. Const. amend. 38 (amending Art. V § 124); Ala. Code §§ 15-22-20 through 15-22-40. The board must make a full annual report to the governor. § 15-22-24(b).   | Frequent and Regular: More than 500 pardons granted annually; 2000+ restoration of rights.   |
| AK    | Governor decides; parole board must be consulted but advice not binding. Alaska Const. art. III, § 21; Alaska Stat. § 33.20.080.  | Rare: Only three pardons since 1995.   |
| AZ    | Governor decides, but may not act without affirmative clemency board recommendation. Ariz. Const. art. V, § 5; Ariz. Rev. Stat. § 31-402(A). Governor must publish reasons for each grant, and report regularly to legislature. Ariz. Rev. Stat. §§ 31-445, -446.   | Infrequent: Pardons increasingly rare since 1990; Gov. Brewer issued only 12 pardons in her six years in office, all in her last year. Gov. Ducey has issued no pardons to date. |
| AR    | Governor decides; parole board must be consulted but advice not binding. Ark. Const. art. VI, § 18; Ark. Code Ann. § 16-93-204(a). Governor must report to legislature on all grants with reasons. Ark. Const. art. VI, § 18.   | Frequent and Regular: About 100 grants each year, 300-500 applications annually.   |
| CA    | Governor decides; parole board may be consulted. For recidivists, board must be consulted and majority of supreme court justices must recommend. Cal. Const. art. V, § 8; Cal. Penal §§ 4800, 4812-4813, 4852.16. Governor report grants to legislature, including facts and reasons for grants. Cal. Const. art. V, § 8; Cal. Penal § 4852.16. | Frequent and Regular: Very few pardons between 1990 and 2011, but Gov. Jerry Brown granted over 1,000 pardons in the following eight years.                                      |
| CO    | Governor decides, "subject to such regulation as may be prescribed by law relative to the manner of applying." Colo. Const. art. IV, § 7. Non-statutory advisory scheme; Governor sends legislature "a transcript of the petition, all proceedings, and the reasons for his action." Colo. Const. art. IV, § 7.                                 | Infrequent: Pardons infrequent since 1990s, although Gov. Bill Ritter issued almost 30 pardons at the end of his term in 2011.   |
| CT    | Independent board appointed by governor exercises pardon power. Conn. Gen. Stat. § 54-124a(f).  | Frequent and Regular: About 400 pardons annually, including provisional pardons (about 30% of applicants get hearing, most of those granted); more than half to misdemeanants.   |



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| <b>DE</b> | Governor decides, but may not act without affirmative clemency board recommendation. Del. Const. art. VII, § 1. Governor must report periodically to legislature. Id.  | Frequent and Regular: Over 250 pardons annually in recent years (about 85% of applications received are approved by Board and 90% of those granted by governor). Applications have tripled since 2005.  |
| <b>DC</b> | President decides under a non-statutory advisory scheme. U.S. Const. art II, § 2.  | Rare: Only a handful of DC offenders have been pardoned by the president since 1980.  |
| <b>FL</b> | Governor decides with concurrence of two cabinet officials. The governor and three cabinet officials act as pardon board. Fla. Const. art. IV, § 8 (a); Fla. Stat. ch. 940.01, 940.05. Governor reports to legislature each restoration and pardon. Id. at 940.01. | Springing: 20-40 pardon grants annually between 2006 and 2010; 20-30 firearms restoration grants annually (about half of applications). Restorations of rights number in thousands.   |
| <b>GA</b> | Independent board appointed by governor exercises pardon power. Ga. Const. art. IV, § 2, para. II. Board must report annually to legislature, the attorney general and the governor. Ga. Code Ann. § 42-9-19.  | Frequent and Regular: Between 300-400 pardons without restoration of gun rights; 100 pardons with gun rights, several hundred “restoration of rights” (approx. 35% of applicants); immigration pardons.   |
| <b>HI</b> | Governor decides; parole board may be consulted. Haw. Const. art. V, § 5; Haw. Rev. Stat. § 353-72.  | Uneven: Gov. Abercrombie issued 33 pardons, fewer than his predecessors. Gov. Lingle granted 132 pardons in eight years, 55 in her last year (2010). About 50 applications filed per year.  |
| <b>ID</b> | Independent board appointed by governor decides all but violent and drug offenses, which must be approved by governor. Idaho Const. art. IV, § 7; Idaho Code Ann. §§ 20-210, 20-240.   | Frequent and Regular: In recent years 20-30 grants annually, from 30-60% of applications filed.   |
| <b>IL</b> | Governor decides, although “the manner of applying therefore may be regulated by law.” Ill. Const. art. V, § 12. Prisoner Review Board authorized to provide advice to governor. 730 Ill. Comp. Stat, Ann. 5/3-3-1(a)(3).  | Uneven, varies with administration: Between 2009 and April 2014, Gov. Quinn granted 1,075 pardons, about half of those that applied. Since 2014 many fewer granted by Gov. Rauner, though still regular practice. Board hears 800 applications each year. |
| <b>IN</b> | Governor decides, “subject to such regulations as may be provided by law.” Ind. Const. art. 5, § 17. Parole board makes advisory recommendations to governor. Ind. Const.  | Springing: Gov. Pence issued only three pardons. Gov. Daniels granted 62 pardons during his eight years in office, acting   |

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|           | art. 5, § 17; Ind. Code §§ 11-9-2-1 to 11-9-2-3. Governor reports to legislature. Ind. Const. art. 5, § 17.   | favorably on about half of those recommended by board.   |
| <b>IA</b> | Governor decides, “subject to such regulations as may be provided by law.” Iowa Const. art. IV, § 16. Parole board authorized to provide advice. Iowa Code §§ 914.1-914.7. Governor reports to legislature on pardons issued and reasons. Iowa Const. art. IV, § 16.  | Uneven, varies with administration: Average of 35 full pardons each year between 2005 and 2011 (fewer since 2009 and in recent years increasingly rare), with another 30-60 grants to restore civil rights and firearms privileges.  |
| <b>KS</b> | Governor decides, subject to regulations and restrictions by law. Kan. Const. art. I, § 7. The governor is required to seek the advice of the prisoner review board, though not bound to follow it. Kan. Stat. Ann. § 22-3701(4). Reports to legislature on each pardon application but need not give reasons. Kan. Stat. Ann. § 22-3703. | Rare: Pardons very rare, primarily for miscarriage of justice.   |
| <b>KY</b> | Governor decides, parole board may be consulted. Ky. Const. § 77. Governor may also restore rights of citizenship, office. Id. §§ 145, 150. Governor reports to legislature reasons for each grant. Id. § 77.   | Uneven: Pardons during term have been rare, but Gov. Bevin departed from this practice, announcing ten pardons in July 2017 and indicating there would be more.  |
| <b>LA</b> | “Upon favorable recommendation of the Board of Pardons,” the governor may pardon “those convicted of offenses against the state.” La. Const. art. IV, § 5(E)(1); La. Rev. Stat. Ann. § 15:572(A).   | Infrequent/Uneven: In four years, Gov. Jindal issued 36 pardons and commuted one sentence, failing to act on hundreds of recommendations from the Board. Previous governors granted 331 (in four years) and 476 (in eight years). Gov. Edwards granted over 3,000 in 16 years. |
| <b>ME</b> | Governor decides, subject to regulation “relative to the manner of applying.” Non-statutory advisory scheme. Me. Const. art. V, pt. 1, § 11.  | Infrequent/Uneven: As of April 2013, Gov. LePage had granted only about 30 pardons since taking office in 2011. Between 2002 and 2011, Gov. Baldacci granted 131 pardons, 51 in his final year. In the past, about 50 hearings each year, 25% result in pardon.                |
| <b>MD</b> | Governor decides; parole board may be consulted. Md. Const. art. II, § 20; Md. Code Ann., Correctional Services § 7-206(3)(ii). Constitution requires governor to publish notice of intention to grant, and to report grants to legislature with reasons. Md. Const. art. II, § 20.   | Sparing/Uneven: As of August 2017, Gov. Hogan had granted no pardons. Gov. O’Malley granted about 150 pardons in his eight years in office, Gov. Ehrlich (2003-  |

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|           |  | 2007) granted 228 pardons out of a total of 439 applications.  |
| <b>MA</b> | Governor may not act without affirmative recommendation of Governor's Council. Mass. Const. pt. 2, ch. II, § I, art. VIII. Governor must report to legislature annually with a list of pardons granted, but not required to give reasons. Mass. Gen. Laws ch. 127, § 152 (2011).   | Rare: Pardons infrequent since early 1990s, only four since 2002 (by Gov. Patrick at the end of his term).   |
| <b>MI</b> | Governor decides, parole board must be consulted but advice not binding. Mich. Const. art. 5, § 14; Mich. Comp. Laws §§ 791.243, 791.244. Must inform the legislature annually of pardons and reasons. Const. art. 5, § 14.  | Infrequent/Uneven: Pardons rare prior to 2006 (only 34 pardons between 1969 and 2006). Gov. Granholm granted 20 pardons, 100 commutations; Gov. Rick Snyder granted no pardons during first term, 11 at start of second.   |
| <b>MN</b> | Governor and high officials (attorney general, chief justice) act as board exercising power. Minn. Const. art. V, § 7. Board required to report to legislature by February 15 each year. Minn. Stat. § 638.075.  | Regular but sparing; 10-20 pardons each year, about one-third of those whose cases are heard. Only those deemed eligible are permitted to file an application, and waivers of the eligibility waiting period are rarely granted.   |
| <b>MS</b> | Governor decides, parole board may be consulted. Miss. Const. art. 5, § 124. Miss. Code Ann. § 47-7-5(3).  | Infrequent/Uneven. No regular process. Almost 200 post-sentence pardons at end of Gov. Barbour's term considered irregular and unusual.  |
| <b>MO</b> | Governor grants reprieves and pardons, subject to rules and regulations prescribed for "the manner of applying." Mo. Const. art. IV, § 7. Parole board must be consulted, but advice not binding. Mo. Rev. Stat. § 217.800.2.  | Infrequent/Uneven: Gov. Nixon granted 110 pardons during his eight years in office (2009-2017), but prior to that very few in recent years. Number of applications has increased dramatically, in part because of extension of firearms restrictions to long guns in 2008. |
| <b>MT</b> | Governor may grant pardons and commutations, and must consult with Board of Pardons and Parole, but since March 2015 he may grant clemency even if board recommends denial. Mont. Const. art. VI, § 12; Mont. Code Ann. §§ 46-23-104(4), 46-23-301(3)(b). Governor must report grants to legislature including reasons. § 46-23-316. | Infrequent: Between 2005 and present, only 25 individuals pardoned.  |
| <b>NE</b> | Governor and high officials (secretary of state and attorney general) act as board of pardon that exercises power. Neb. Const. art. IV, § 13. Governor chairs board.   | Frequent and Regular: Over 100 pardons granted each year between 2002 and 2013, plus reprieves from driver's license   |

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|           |  | revocations. About 70% of grantees also regained firearms privileges. 50% of applicants are granted, one-third misdemeanants.   |
| <b>NV</b> | Governor and high officials (justices of Supreme Court and attorney general) act as board exercising power. Nev. Const. art. 5, § 14. Governor must report to the legislature at the beginning of each session every clemency action (no reasons necessary). Nev. Const. art. 5, § 13. | Frequent and Regular: An average of 60 grants each year since 2013, more than half of those that apply. (In 2017, 83 applied, 60 heard, 55 granted.)  |
| <b>NH</b> | Governor acts upon the advice of the Executive Council. N.H. Const. pt. 2, art. 52. Governor traditionally will not act without majority recommendation from Council.  | Rare: The attorney general receives about 25 applications for clemency per year, but only two pardons and two sentence commutations since 1996.   |
| <b>NJ</b> | Governor decides, parole board may be consulted. N.J. Const. art. V, § 2, para. 1. Governor must report annually to the legislature the particulars of each grant, with the reasons. N.J. Stat. Ann. § 2A:167-3.1.   | Infrequent: Recent governors have granted relatively few pardons, and generally only at end of their terms.   |
| <b>NM</b> | Governor decides, (“[s]ubject to such regulations as may be prescribed by law”). N.M. Const. art. V, § 6. Parole Board may be consulted. N.M. Stat. Ann. § 31-21-17.   | Infrequent: Pardons granted only in “extraordinary circumstances.” Relatively infrequent (Gov. Martinez has issued no pardons; Gov. Richardson issued 80 pardons in ten years).   |
| <b>NY</b> | Governor decides, subject to regulation in “the manner of applying for pardons.” N.Y. Const. art. IV, § 4. Governor must report annually to legislature on pardons but not his reasons for granting them. Id.  | Uneven: As of July 1, 2017, Gov. Cuomo had granted only seven pardons, most for immigration purposes. Also, more than 100 “conditional” pardons through the youthful offender program. Gov. Paterson granted 33 immigration pardons in 2010, and a handful of others. |
| <b>NC</b> | Governor’s power unlimited, subject only to regulation in the manner of applying. N.C. Const. art. III, § 5(6). Post Release Supervision and Parole Commission has authority to assist the governor in exercising the power. N.C. Gen. Stat. § 143B-720(a).                            | Rare: Only six pardons since 2001, all granted for innocence. Pardon applications average about 150 annually.   |
| <b>ND</b> | Governor decides, N.D. Const. art. V, § 7, and may appoint a “pardon advisory board,” consisting of the attorney general, two members of the parole board, and two citizens. N.D. Cent. Code § 12-55.1-02.   | Infrequent: Between 2005 and 2009, 163 applications received but only six pardons granted.  |
| <b>OH</b> | Governor decides in consultation with parole board. Must report to legislature details of each commutation and   | Springing: Gov. Kasich granted 86 pardons through 2016. Gov.  |

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|           | pardon granted, and reasons for each. Ohio Const. art. III, § 11; Ohio Rev. Code Ann. § 2967.07.  | Strickland granted 290 pardons in four years, mostly to minor non-violent offenses.  |
| <b>OK</b> | Governor decides, may not act without affirmative recommendation of board of pardons and parole. Okla. Const. art. VI, § 10. The governor must report to the legislature on each grant at regular session, though not required to give reasons. Id. | Frequent and Regular: About 100 pardon grants annually (80% of those that apply).  |
| <b>OR</b> | Governor decides with no provision for advice. Or. Const. art. V, § 14. Governor must report to the legislature each grant of clemency, including the reasons for the grant. Or. Rev. Stat. § 144.660.  | Infrequent: The governor has issued few pardons in recent years. Gov. Kate Brown has granted four pardons in three-and-a-half years in office. Between 2005 and January 2011, Gov. Kulongoski granted 20 pardons out of several hundred applications.  |
| <b>PA</b> | Governor decides with no provision for advice. Or. Const. art. V, § 14. Governor must report to the legislature each grant of clemency, including the reasons for the grant. Or. Rev. Stat. § 144.660.  | Frequent and Regular: Of 500-600 applications, Board recommends about 150 favorably each year, most of which are granted; 20% to misdemeanors and summary offenses.  |
| <b>PR</b> | Governor decides. P.R. Const. art. IV, § 4. Parole Board may make non-binding recommendations.  | Rare: Frequency of pardon grants has decreased since expansion of expungement law in 2005.   |
| <b>RI</b> | Governor pardons “by and with the advice and consent of the senate.” R.I. Const. art. IX, § 13.   | Rare: No pardon issued to a living person in many years.   |
| <b>SC</b> | Independent board appointed by governor exercises pardon power except in capital cases (where governor retains power). S.C. Const. art. IV, § 14; S.C. Code Ann. § 24-21-920.   | Frequent and Regular: Board issues 300-400 grants per year, hearing about 80-85 cases every two months; grants 60-65% of applicants. Few misdemeanants.  |
| <b>SD</b> | Governor decides. S.D. Const. art. IV, § 3. Board of Pardons and Paroles must recommend pardon in order to obtain sealing relief. S.D. Codified Laws § 24-14-11.  | Frequent and Regular: Between 60 and 70 applications filed annually, about 60% recommended by Board to the governor, who grants most of those recommended.   |
| <b>TN</b> | Governor has the power to pardon. Tenn. Const. art. III, § 6. Governor advised by the parole board. Tenn. Code Ann. § 40-28-104. Must report grants and reasons to legislature “when requested.” Tenn. Code Ann. §§ 40-27-101, 107.                 | Uneven: In July 2017, Gov. Bevin issued ten pardons, the first mid-term pardons in Tennessee in many years. In January 2011, Gov. Bredesen granted 22 pardons (“collected over his eight years in office”), 16 of which were recommended by the board. |

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| <b>TX</b> | Governor decides, but may not act without affirmative recommendation of Board of Pardons and Parole. Tex. Const. art. IV, § 11(b).   | Sparing: Eight to ten pardons annually most years since 2001, and one-third of those recommended. 200 applications are received annually.   |
| <b>UT</b> | Independent board appointed by the governor. Utah Const. art. VII, § 12; Utah Code Ann. § 77-27-5(1).  | Infrequent: Board receives only three to five requests for pardon a year, and only about ten pardons have been granted in the past decade (availability of expungement makes less necessary).   |
| <b>VT</b> | Governor decides; parole board may be consulted. Vt. Const. ch. II, § 20.  | Infrequent: Gov. Shumlin granted only two pardons since taking office in 2011. In his nearly eight years in office (2003-2011), Gov. Douglas granted 13 pardons, fewer than two a year.   |
| <b>VA</b> | Governor decides; parole board may be consulted. Va. Const. art. V, § 12. Constitution also requires governor to make annual report to the legislature setting forth “the particulars of every case” of pardons or commutations granted, with reasons. Id.                   | Sparing: Gov. McAuliffe pardoned 38 individuals in his first two years in office, and restored rights to thousands. Gov. McDonnell restored rights generously, but pardoned only seven individuals. He also commuted two sentences retroactively to prevent deportation. Gov. Kaine pardoned 108 individuals in his four years in office. |
| <b>WA</b> | Governor decides “under such regulations and restrictions as may be prescribed by law.” Wash. Const. art. III, § 9. Clemency board may be consulted. Wash. Rev. Code §§ 9.94A.885 (1), 10.01.120. Governor reports to legislature with reasons. Wash. Const. art. III, § 11. | Sparing: About 35 petitions each year, eight to ten of which go to hearings. Between January 2011 and August 2017, Gov. Jay Inslee, denied a number of favorable recommendations from Board. Gov. Gregoire (2003-2011) granted 27 pardons: two conditional and two to avoid deportations.   |
| <b>WV</b> | Governor decides; may seek advice from parole board. W. Va. Const. art. 7, § 11; W. Va. Code § 5-1-16. Governor reports facts of grants with reasons. W. Va. Const. art. 7, § 11; W. Va. Code § 5-1-16.  | Rare: Governor receives between 50-100 applications each year, but pardon grants are rare (only 121 in 36 years, by nine governors).  |
| <b>WI</b> | Governor decides under a non-statutory pardon advisory board. Wis. Const. art. V, § 6. Governor must   | Infrequent/Uneven: Gov. Walker granted no pardons, and stated an intent to accept no applications.  |

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|                  | <p>communicate annually with legislature each case of clemency and the reasons. Wis. Const. art. V, § 6.</p>   | <p>Gov. Doyle granted 293 pardons overall, 176 in his final year, mainly for dated minor offenses, representing 15% of applicants, all with Board recommendation. Few misdemeanants.</p> |
| <p><b>WY</b></p> | <p>Governor decides, subject to legislative controls on the manner of applying. Wyo. Const. art. 4, § 5. Governor must report every two years to legislature on grants, with the reasons for each one. Id.</p> | <p>Infrequent: Current governor has issued only a handful of pardons in eight years. From 2005 to 2010, 22 pardons and 28 restorations of rights (25% of applications filed).</p>        |

## Appendix B: Proposed Presidential Pardon Power Legislation

| Bill (Year) & Category  | Chamber & Sponsorship   | Summary   |
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| <b>H.J.Res. 1145 (1974)</b><br><b>Ban on Pre-Conviction Pardons; Oversight Proposal</b> | House<br><br>Introduced by Democratic Rep. Thomas A. Luken.<br><br>Co-sponsored by two Democrats. | The president may pardon a person for an offense only after such person is convicted for such offense, unless a majority of each House of Congress approves of a pardon prior to such conviction. A two-thirds vote of each House of Congress may overrule any such reprieve or pardon granted by the president after such conviction of such person. |
| <b>S.J.Res. 241 (1974)</b><br><b>Oversight Proposal</b>                                 | Senate<br><br>Introduced by Democratic Sen. Walter Mondale.<br><br>No co-sponsors.                | No pardon granted to an individual by the president shall be effective if two-thirds of both Houses of Congress disapproves of the granting of the pardon within 180 days of its issue.   |
| <b>S.J.Res. 239 (1974)</b><br><b>Ban on Pre-Conviction Pardons</b>                      | Senate<br><br>Introduced by Democratic Sen. William Proxmire.<br><br>No co-sponsors.              | The president shall have the power to pardon only after an individual has been convicted of an offense and sentenced.   |
| <b>H.J.Res. 32 (1974)</b><br><b>Ban on Pre-Conviction Pardons</b>                       | House<br><br>Introduced by Democratic Rep. John Dent.<br><br>No co-sponsors.                      | The president shall have the power to pardon only after an individual has been convicted of an offense and sentenced.   |
| <b>H.J.Res. 30 (1974)</b><br><b>Oversight Proposal</b>                                  | House<br><br>Introduced by Republican Rep. Silvio Conte.<br><br>No co-sponsors.                   | Congress shall have the power to disapprove any reprieve or pardon granted by the president, and no such reprieve or pardon shall take effect if it is disapproved by two-thirds votes of both Houses of the Congress no later than 90 days after it is granted by the president.   |
| <b>H.J.Res. 22 (1974)</b>   | House   | Expresses the sense of the Congress that no pardon should be granted for an offense until   |



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| <b>Ban on Pre-Conviction Pardons</b>   | Introduced by Republican Rep. Matthew Rinaldo.<br><br>No co-sponsors.                 | after the person pardoned has been convicted of the offense.  |
| <b>H.J.Res. 48 (1974)</b><br><br><b>Ban on Pre-Conviction Pardons; Oversight Proposal</b>  | House<br><br>Introduced by Democratic Rep. Thomas A. Luken.<br><br>No co-sponsors.    | The president may grant a pardon to a person for an offense only after such person is convicted for such offense, unless a majority of each House of Congress approves of a pardon prior to such conviction. States that a two-thirds vote of each House of Congress may overrule any such reprieve or pardon granted by the president after such conviction of such person.  |
| <b>H.J.Res. 13 (1974)</b><br><br><b>Oversight Proposal</b>                                 | House<br><br>Introduced by Democratic Rep. Herman Badillo.<br><br>No co-sponsors.     | No pardon granted to an individual by the president shall be effective if two-thirds of each House of Congress disapproves of the granting of the pardon within 180 days of its issuance.   |
| <b>H.J.Res. 115 (1974)</b><br><br><b>Ban on Pre-Indictment Pardons</b>                     | House<br><br>Introduced by Democratic Rep. Ella Grasso.<br><br>No co-sponsors.        | No reprieve or pardon shall be granted for an offense until after the filing of an indictment or the formal commencement of other criminal action with respect to that offense.   |
| <b>H.J.Res. 8 (1975)</b><br><br><b>Ban on Self-Pardons; Ban on Self-Interested Pardons</b> | House<br><br>Introduced by Democratic Rep. Elizabeth Holtzman.<br><br>No co-sponsors. | Constitutional amendment stating that no president may pardon himself. States that no pardon may be granted to any person who holds or held the office of vice president or to any person who held the office of president for any offense, except after conviction, nor shall such pardon be granted unless the president certifies to the Congress that he is satisfied that such person either is innocent of the charges of which that person was convicted or is suffering from a terminal illness, and the Congress concurs in the granting of the pardon by a three-fourths vote of both Houses. |
| <b>H.J.Res. 120 (1975)</b>   | House   | Constitutional amendment stating that no president may pardon himself. States that no pardon may be granted to any person who holds or held the office of vice president or to  |

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| <p><b>Ban on Self-Pardons; Ban on Self-Interested Pardons</b></p>                                | <p>Introduced by Democratic Rep. Elizabeth Holtzman.</p> <p>Co-sponsored by five Democrats and one Republican.</p>       | <p>any person who held the office of president for any offense, except after conviction, nor shall such pardon be granted unless the president certifies to the Congress that he is satisfied that such person either is innocent of the charges of which that person was convicted or is suffering from a terminal illness, and the Congress concurs in the granting of the pardon by three-fourths vote of both Houses.</p>  |
| <p><b>H.R. 1627 (1975)</b></p> <p><b>Ban on Self-Pardons; Ban on Self-Interested Pardons</b></p> | <p>House</p> <p>Introduced by Democratic Rep. Elizabeth Holtzman.</p> <p>Co-sponsored by eight Democrats.</p>            | <p>No president may pardon himself. No pardon may be granted to any person who holds or held the office of vice president or to any person who held the office of president for any offense, except after conviction, nor shall such pardon be granted unless the president certifies to the Congress that he is satisfied that such person either is innocent of the charges of which that person was convicted or is suffering from a terminal illness, and the Congress concurs in the granting of the pardon by three-fourths vote of both Houses.</p> |
| <p><b>H.R. 5551 (1975)</b></p> <p><b>Oversight Proposal</b></p>                                  | <p>House</p> <p>Introduced by Republican Rep. Silvio Conte.</p> <p>No co-sponsors.</p>                                   | <p>Congress shall have the power to disapprove any reprieve or pardon granted by the president, and no such reprieve or pardon shall take effect if it is disapproved by two-thirds vote of both Houses of the Congress no later than 90 days after it is granted.</p>   |
| <p><b>S. 2090 (1977)</b></p> <p><b>Oversight Proposal</b></p>                                    | <p>House</p> <p>Introduced by Republican Rep. Silvio Conte.</p> <p>No co-sponsors.</p>                                   | <p>Grants Congress the power to disapprove reprieves and pardons granted by the president.</p>   |
| <p><b>H.R. 1348 (1977)</b></p> <p><b>Ban on Pre-Conviction Pardons; Oversight Proposal</b></p>   | <p>House</p> <p>Introduced by Democratic Rep. Clarence Long.</p> <p>Co-sponsored by one Democrat and one Republican.</p> | <p>Prohibits the president from granting a pardon to a person for a federal offense for which such person has not been convicted, unless the granting of such pardon has been approved by a majority of each House of Congress.</p>  |

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| <p><b>H.R. 3489 (1977)</b></p> <p><b>Ban on Pre-Conviction Pardons; Oversight Proposal</b></p>  | <p>House</p> <p>Introduced by Democratic Rep. Clarence Long.</p> <p>No co-sponsors.</p>                                       | <p>Prohibits the president from granting a pardon to a person for a federal offense for which such person has not been convicted, unless the granting of such pardon has been approved by a majority of each House of Congress.</p>   |
| <p><b>H.Res. 928 (1977)</b></p> <p><b>Ban on Pre-Conviction Pardons; Oversight Proposal</b></p> | <p>House</p> <p>Introduced by Democratic Rep. Clarence Long.</p> <p>Co-sponsored by one Democrat.</p>                         | <p>Prohibits the president from granting a pardon to a person for a federal offense for which such person has not been convicted, unless the granting of such pardon has been approved by a majority of each House of Congress.</p>   |
| <p><b>H.Con.Res. 132 (1979)</b></p> <p><b>Oversight Proposal</b></p>                            | <p>House</p> <p>Introduced by Republican Rep. Silvio Conte.</p> <p>No co-sponsors.</p>  | <p>Provides that the Congress shall have the power to disapprove any reprieve or pardon granted by the president, and no such reprieve or pardon shall take effect if it is disapproved by two-thirds votes of both Houses of the Congress no later than 90 days after it is granted.</p> |
| <p><b>H.Res. 9 (1989)</b></p> <p><b>Ban on Pre-Conviction Pardons</b></p>                       | <p>House</p> <p>Introduced by Democratic Rep. Andrew Jacobs Jr.</p> <p>No co-sponsors.</p>                                    | <p>Permits the president to grant a reprieve or a pardon to an individual only after such individual has been convicted.</p>  |
| <p><b>H.Res. 1531 (1991)</b></p> <p><b>Ban on Pre-Conviction Pardons</b></p>                    | <p>House</p> <p>Introduced by Democratic Rep. Andrew Jacobs Jr.</p> <p>No co-sponsors.</p>                                    | <p>Permits the president to grant a reprieve or a pardon to an individual only after such individual has been convicted.</p>  |
| <p><b>H.R. 5961 (1993)</b></p> <p><b>Ban on Pre-Conviction Pardons</b></p>                      | <p>House</p> <p>Introduced by Democratic Rep. Andrew Jacobs Jr.</p> <p>Co-sponsored by ten Democrats and one independent.</p> | <p>The president shall only have the power to grant a reprieve or a pardon for an offense to an individual who has been convicted of such an offense.</p>   |

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| <p><b>H.J.Res. 156 (1995)</b></p> <p><b>Ban on Pre-Conviction Pardons</b></p>        | <p>House</p> <p>Introduced by Democratic Rep. Andrew Jacobs Jr.</p> <p>No co-sponsors.</p>                              | <p>The president shall only have the power to grant a reprieve or a pardon for an offense to an individual who has been convicted of such an offense.</p>  |
| <p><b>H.J.Res. 350 (2000)</b></p> <p><b>Pardon Attorney Reform Proposal</b></p>      | <p>Senate</p> <p>Introduced by Republican Sen. Orrin Hatch.</p> <p>Co-sponsored by 12 Republicans.</p>                  | <p>If the president delegates to the pardon attorney the responsibility for investigating, in any particular matter or case, a potential grant of executive clemency, the pardon attorney shall prepare and make available to the president a written report, which shall include: (1) a description of efforts of the pardon attorney as required by this law and (2) any written statement submitted by a victim.</p>  |
| <p><b>H.J.Res. 232 (2000)</b></p> <p><b>Pardon Attorney Reform Proposal</b></p>      | <p>House</p> <p>Introduced by Republican Rep. Vito Fossella.</p> <p>Co-sponsored by four Republicans.</p>               | <p>If the president delegates to the pardon attorney the responsibility for investigating, in any particular matter or case, a potential grant of executive clemency, the pardon attorney shall prepare and make available to the president a written report, which shall include: (1) a description of efforts of the pardon attorney as required by this law and (2) any written statement submitted by a victim.</p>  |
| <p><b>H.J.Res. 1125 (2001)</b></p> <p><b>Timing Proposal; Oversight Proposal</b></p> | <p>House</p> <p>Introduced by Democratic Rep. Barney Frank.</p> <p>Co-sponsored by one Democrat and one Republican.</p> | <p>The power to grant reprieves and pardons shall not be exercised between October 1 of a year in which a presidential election occurs and January 21 of the year following; except that after October 1 in said year a president may delay the execution of a sentence of death until January 25 of the year following. All pardons and reprieves must be announced publicly at the time they are granted.</p>  |
| <p><b>H.J.Res. 1120 (2006)</b></p> <p><b>Oversight Proposal</b></p>                  | <p>House</p> <p>Introduced by Democratic Rep. John Conyers Jr.</p> <p>Co-sponsored by 11 Democrats.</p>                 | <p>Not later than 30 days after an individual who is or was an executive branch official receives a pardon or reprieve from the president, the president shall report to Congress (1) the name and position of the individual who received the pardon or reprieve; (2) the nature of the offense involved; (3) the date of the pardon or reprieve; (4) the effect of the pardon or reprieve on imprisonment for an existing conviction, if the offense pardoned was one for which a conviction occurred; (5) whether the</p> |

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|   |   | individual was involved in any on-going criminal or civil investigation; (6) whether the president sought the recommendation of the lead federal official who investigated or is investigating the individual as to the positive or negative implications of the pardon or reprieve and the nature of that official's recommendation; and (7) whether the lead federal official who investigated or is investigating the individual believes or has reason to believe that the pardon or reprieve would interfere with an on-going investigation and what impact the pardon or reprieve had on any on-going investigations into possible misconduct by the president, vice president, or other officials within the administration. |
| <b>H.J.Res. 46 (2007)</b><br><br><b>Oversight Proposal</b>              | House<br><br>Introduced by Democratic Rep. Steve Cohen.<br><br>Co-sponsored by two Democrats.     | The grant of a reprieve or pardon by the president shall become effective only on the review and consent of two-thirds of the justices of the Supreme Court, pursuant to a finding by such justices that the grant of such reprieve or pardon is consistent with the interests of justice and does not undermine the effectiveness, integrity, and impartiality of the federal criminal justice system.   |
| <b>H.J.Res. 151 (2008)</b><br><br><b>Ban on Self-Interested Pardons</b> | House<br><br>Introduced by Democratic Rep. Jerrold Nadler.<br><br>Co-sponsored by nine Democrats. | Expressing the sense of the House of Representatives that the president should not issue pardons to senior members of his administration during the final 90 days of his term of office.  |
| <b>H.J.Res. 39 (2009)</b><br><br><b>Ban on Self-Interested Pardons</b>  | House<br><br>Introduced by Democratic Rep. Jerrold Nadler.<br><br>No co-sponsors.                 | Expressing the sense of the House of Representatives that the president should not issue pardons to senior members of his administration during the final 90 days of his term of office.  |
| <b>S. 2042 (2017)</b><br><br><b>Ban on Self-Pardons</b>                 | House<br><br>Introduced by Democratic Rep. Al Green.  | The president shall have no power to grant to himself a reprieve or pardon for an offense against the United States.  |

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|  | Co-sponsored by three Democrats.   |  |
| <b>H.R. 3626 (2017)</b><br><br><b>Ban on Self-Interested Pardons</b>   | House<br><br>Introduced by Democratic Rep. Steve Cohen.<br><br>Co-sponsored by ten Democrats and one Republican. | The president shall not have the power to grant pardons and reprieves to himself or herself, to the president's brother, sister, brother-in-law, sister-in-law, spouse, parent, child, or grandchild or to the spouse of the president's grandchild, to the president's aunt, uncle, nephew or niece or to the spouse of the president's nephew or niece, or to the president's first or second cousin, the spouse of the president's first or second cousin, the president's mother-in-law, father-in-law, son-in-law, or daughter-in-law, or to any current or former member of the president's administration, or to anyone who worked on the president's presidential campaign as a paid employee. |
| <b>H.Con.Res. 646 (2017)</b><br><br><b>Oversight Proposal</b>          | House<br><br>Introduced by Democratic Rep. Raja Krishnamoorthi.<br><br>Co-sponsored by 37 Democrats.             | Not later than three days after the president grants any reprieve or pardon, the attorney general shall publish in the Federal Register and on the official website of the president the following: (1) the name of the person pardoned; (2) the date on which the reprieve or pardon was issued; and (3) the full text of the reprieve or pardon.   |
| <b>H.J.Res. 1122 (2017)</b><br><br><b>Oversight Proposal</b>           | House<br><br>Introduced by Democratic Rep. Ted Lieu.<br><br>Co-sponsored by three Democrats.                     | Requesting the president and directing the attorney general to transmit certain documents to the House of Representatives relating to the president's use of the pardon power.   |
| <b>H.J.Res. 18 (2017)</b><br><br><b>Ban on Self-Interested Pardons</b> | House<br><br>Introduced by Democratic Rep. Karen Bass.<br><br>Co-sponsored by 51 Democrats.                      | Expressing that the House of Representatives disapproves of the president granting to himself or any member of his family, including those related solely by marriage, any reprieve or pardon, or any commutation of a sentence.   |
| <b>H.J.Res. 118 (2018)</b>   | House  | If the president grants an individual a pardon for an offense that arises from an investigation  |

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| <p><b>Oversight Proposal</b></p>  | <p>Introduced by Democratic Rep. Adam Schiff.</p> <p>Co-sponsored by 42 Democrats.</p>                | <p>in which the president, or a relative of the president, is a target, subject, or witness, not later than 30 days after the date of such pardon, the attorney general shall submit to the chairmen and ranking members of the appropriate congressional committees all materials of an investigation that were obtained by a United States attorney, another federal prosecutor, or an investigative authority of the federal government, relating to the offense for which the individual is so pardoned.</p>  |
| <p><b>H.R. Res. 523 (2018)</b></p> <p><b>Ban on Self-Pardons</b></p>            | <p>House</p> <p>Introduced by Democratic Rep. Maxine Waters.</p> <p>Co-sponsored by 16 Democrats.</p> | <p>Expressing the sense of Congress that the president does not have the authority under the Constitution to grant himself reprieve or pardon.</p>  |
| <p><b>H.J.Res. 1132 (2019)</b></p> <p><b>Ban on Self-Pardons</b></p>            | <p>House</p> <p>Introduced by Democratic Rep. Al Green.</p> <p>No co-sponsors.</p>                    | <p>The president shall have no power to grant to himself a reprieve or pardon.</p>  |
| <p><b>H.J.Res. 1138 (2019)</b></p> <p><b>Ban on Self-Interested Pardons</b></p> | <p>House</p> <p>Introduced by Democratic Rep. Steve Cohen.</p> <p>Co-sponsored by ten Democrats.</p>  | <p>The president shall not have the power to grant pardons and reprieves to himself or herself, to the president's brother, sister, brother-in-law, sister-in-law, spouse, parent, child, or grandchild or to the spouse of the president's grandchild, to the president's aunt, uncle, nephew or niece or to the spouse of the president's nephew or niece, or to the president's first or second cousin, the spouse of the president's first or second cousin, the president's mother-in-law, father-in-law, son-in-law, or daughter-in-law, or to any current or former member of the president's administration, or to anyone who worked on the president's presidential campaign as a paid employee.</p> |
| <p><b>H.J.Res. 282 (2019)</b></p>   | <p>House</p>  | <p>If the president grants an individual a pardon for an offense that arises from an investigation</p>  |

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| <p><b>Oversight Proposal</b></p>                                   | <p>Introduced by Democratic Rep. Adam Schiff.</p> <p>Co-sponsored by 27 Democrats.</p>                            | <p>in which the president, or a relative of the president, is a target, subject, or witness, not later than 30 days after the date of such pardon, the attorney general shall submit to the chairmen and ranking members of the appropriate congressional committees all materials of an investigation that were obtained by a United States attorney, another federal prosecutor, or an investigative authority of the federal government, relating to the offense for which the individual is so pardoned.</p>   |
| <p><b>H.J.Res. 242 (2019)</b></p> <p><b>Oversight Proposal</b></p> | <p>Senate</p> <p>Introduced by Democratic Sen. Catherine Cortez Masto.</p> <p>Co-sponsored by four Democrats.</p> | <p>If the president grants an individual a pardon for an offense that arises from an investigation in which the president, or a relative of the president, is a target, subject, or witness, not later than 30 days after the date of such pardon, the attorney general shall submit to the chairmen and ranking members of the appropriate congressional committees all materials of an investigation that were obtained by a United States attorney, another federal prosecutor, or an investigative authority of the federal government, relating to the offense for which the individual is so pardoned.</p> |
| <p><b>H.J.Res. 306 (2019)</b></p> <p><b>Oversight Proposal</b></p> | <p>House</p> <p>Introduced by Democratic Rep. Raja Krishnamoorthi.</p> <p>Co-sponsored by 21 Democrats.</p>       | <p>Not later than three days after the date on which the president grants any reprieve or pardon for an offense against the United States, the attorney general shall publish in the Federal Register and on the official website of the president the following: (1) the name of the person pardoned; (2) the date on which the reprieve or pardon was issued; and (3) the full text of the reprieve or pardon.</p>   |